



Provision of Deep Sea Container rail transport services between ports and key inland destinations in Great Britain

**Decision to accept
commitments offered by
Freightliner Limited and
Freightliner Group Limited**

18 December 2015

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1. Introduction

- 1.1 In this decision the Office of Rail and Road (**ORR**) accepts¹ the final commitments offered by Freightliner Limited and Freightliner Group Limited (together, **Freightliner**) offered on 12 November 2015 (the **Final Commitments**).²
- 1.2 As a result of accepting the Final Commitments, ORR has discontinued its investigation in relation to Freightliner's arrangements with its customers for the provision of deep sea container (**DSC**) rail transport services between certain ports and key inland destinations in Great Britain, with no decision made as to whether or not Chapter I/Chapter II of the Competition Act 1998 (the **Act**) and/or Articles 101/102 of the Treaty on the Functioning of the European Union (**TFEU**) have been infringed.
- 1.3 In summary, in ORR's preliminary view, certain arrangements Freightliner has with its customers may restrict competition by foreclosing access to customers for actual or potential rail freight operating company (**FOC**) competitors.³ Having considered the Final Commitments and having considered representations received in response to consultations issued by ORR in relation to this matter⁴, ORR considers that the Final Commitments fully address its competition concerns.
- 1.4 Acceptance of the Final Commitments does not prevent ORR from taking any action in relation to competition concerns which are not addressed by these commitments. Moreover, notwithstanding that the investigation has been discontinued, this does not prevent ORR from continuing its investigation, making an infringement decision, or giving a direction in circumstances where ORR has reasonable grounds for:
- believing that there has been a material change of circumstances since the Final Commitments were accepted;
 - suspecting that a person has failed to adhere to one or more of the terms of the Final Commitments; or

¹ In accordance with section 31A(2) of the Competition Act 1998

² As set out in Annex A

³ ORR's competition concerns regarding exclusivity apply in the '**Relevant Markets**' as defined at paragraphs 5.3 to 5.27, below. ORR's competition concerns relating to reselling arrangements apply across Great Britain

⁴ See Annex B

- suspecting that information which led ORR to accept the Final Commitments was incomplete, false or misleading in a material particular.⁵

1.5 The remainder of this decision sets out ORR's reasons for accepting the Final Commitments and includes information regarding:

- the parties and market context;
- ORR's investigation and commitments discussions;
- ORR's competition concerns;
- the Final Commitments offered by Freightliner;
- ORR's assessment of the Final Commitments; and
- the commitments decision.

1.6 Annex B sets out representations received in response to the public consultations and ORR's consideration of these responses.

⁵ Section 31B(4) of the Act

2. The parties

A. Freightliner Limited

- 2.1 Freightliner Limited is a private limited company incorporated in England and Wales on 20 October 1995. Its reported revenue for the year ended 31 March 2014 was £184 million.
- 2.2 Freightliner Limited is a rail freight operator whose primary activity is the provision of DSC rail transport services in Great Britain between DSC ports and inland rail terminals. Freightliner Limited also provides road haulage services via its fleet of lorries (Freightliner Road Services) and ancillary services (e.g. terminal storage). Freightliner Limited operates around 100 daily rail transport services across Great Britain.
- 2.3 ORR's investigation to date has concerned only the provision of inland DSC rail transport services on certain identified markets⁶ in Great Britain. For the avoidance of doubt the investigation does not relate to Freightliner Limited's road or ancillary services.

B. Freightliner Group Limited

- 2.4 Freightliner Limited is a subsidiary of Freightliner Group Limited, a private limited company incorporated in England and Wales on 14 December 2004. Freightliner Group Limited is the non-trading holding company for the Freightliner group of companies. The Freightliner group of companies provide international rail freight services in Great Britain, Poland, Germany, the Netherlands and Australia.
- 2.5 Freightliner Group Limited's fleet includes approximately 250 standard gauge locomotives (mostly diesel-electric) as well as 5,500 wagons. Freightliner employs over 2,500 people.
- 2.6 On 25 March 2015, Genesee & Wyoming Inc. (a public company listed on the New York Stock Exchange) acquired the majority of the shares in Freightliner Group Limited.

⁶ The approach taken by ORR in relation to market definition and the identified '**Relevant Markets**' in which ORR's competition concerns about potential exclusionary conduct arise is outlined at paragraphs 5.3 to 5.27

3. Background

3.1 This chapter sets out ORR's preliminary view of the key characteristics of the DSC transport sector in Great Britain.

A. DSCs

3.2 DSCs are intermodal containers that adhere to the ISO⁷ standards for containers across the world. DSCs have specific technical characteristics which allow them to be stacked on several levels on sea-borne vessels.⁸ DSCs typically measure 20 or 40 feet in length.

3.3 DSCs are capable of holding a wide range of freight, including but not limited to: white goods; consumer electronics; and perishables, with some DSCs having special adaptations, such as refrigeration, to enable them to perform this function. As the term 'intermodal' suggests, DSCs are designed to be easily transferable between transport modes, allowing for efficient transfer between the sea and inland legs of overall journeys.

3.4 The focus of this decision is on DSCs which are transported between inland destinations within Great Britain from origin points outside Northern Europe. Such DSCs arrive in Great Britain on large container ships operated by international shipping lines.

i. Usage of DSCs

3.5 Shipping lines utilise their DSCs for the purposes of importing and exporting goods on behalf of their downstream customers.⁹

3.6 ORR's preliminary view is that the nature of competition in the DSC transport sector in Great Britain is driven by imports. The principal use of DSCs is to import goods from overseas to businesses in Great Britain. These businesses are often retailers wishing to import internationally manufactured or produced goods for the ultimate purpose of onward sale to downstream 'end' customers.

3.7 Great Britain's exports in DSCs consist primarily of low value materials such as scrap metal and paper. It is ORR's preliminary view that the business case for export

⁷ International Organization for Standardisation

⁸ DSCs have been the subject of European Commission decisions, such as the decision appealed in Case IV/33.941 *HOV SVZ/MCN 94/210/EC* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31994D0210> in which DSCs were described as 'sea-borne containers'

⁹ DSCs are typically owned by shipping lines

largely rests on the availability of containers which would otherwise be returned to overseas destinations empty.¹⁰

ii. Receiving ports

- 3.8 Only certain ports are large enough to accommodate large container ships. The ports in Great Britain that currently accommodate large container ships are: Felixstowe; Southampton; London Gateway; Tilbury; Thamesport; and, Liverpool.
- 3.9 The vast majority of DSCs arriving at and departing from Great Britain are routed through the key southern ports of Felixstowe, Southampton and Tilbury (hereinafter the '**Southern Ports**').¹¹
- 3.10 Container ships typically make only a single call in Great Britain to load or offload all of their DSCs bound for inland destinations.¹² This creates a need for the onward transport of DSCs to inland destinations from ports and vice versa.

iii. Models of contracting

- 3.11 Once a DSC arrives at a port, the onward transport leg typically follows one of two models, known as line haul and merchant haul. The model which is followed depends on the commercial preferences of the business importing the goods in the DSCs.

Merchant haul

- 3.12 The merchant haul model involves the businesses who are importing goods collecting the DSCs from the port and arranging their own transport solution to their premises so the goods inside the DSCs can be unloaded for their subsequent use.
- 3.13 Importers utilising merchant haul are almost universally under strict contractual obligations to return the DSCs (which remain under the ownership of the shipping line) either to the origin port or to a designated DSC collection centre, thus enabling the shipping line to re-deploy its DSCs. Importers using merchant haul may also be charged for the services of lifting the DSCs containing their goods from the container ship onto the onward transport vehicle and for any time taken (including penalties for delays) both to transport the DSCs to the delivery point and return them either to the origin port or the agreed collection point.

¹⁰ In 2013 the value of non-EU imports arriving through Felixstowe was £33.8 billion in contrast to only £11.2 billion of exports. 52% of export tonnage consisted of pulp/waste paper and scrap metal

¹¹ The Southern Ports accounted for approximately 70% of the total tonnage of DSCs entering the UK in 2013, www.gov.uk/government/statistics/port-freight-statistics-2013-final-figures. Felixstowe, Southampton and Tilbury account for approximately 95% of DSC volume, by tonnage, being routed through ports in the South of Great Britain; data is for the year 2015 up to October. Source: Paladin database, Network Rail

¹² Further details as to why this is the case are set out in the section on market definition at paragraphs 5.7 to 5.10, below

3.14 Due to the logistics involved in returning DSCs to ports, the merchant haul model is generally preferred by customers where the distance between the deep sea port and the final destination is relatively short.

Line haul

3.15 The line haul model involves shipping lines arranging the onward transport leg of journeys on behalf of importers. Essentially this model offers retailers a 'door-to-door' transport solution whereby the shipping line organises the entire international journey of the DSCs from the premises of the overseas manufacturer/producer to the forecourt of the importer's depot.

3.16 Under the line haul model, shipping lines typically deal directly with domestic transport providers with a view to obtaining onward transport solutions for the movement of significant volumes of DSCs between ports and the inland destinations where their customers (importers based in Great Britain) are based.

3.17 It is ORR's preliminary view that line haul is typically the preferred model where the distances between DSC ports and inland destinations are longer and the volumes of DSCs being transported are higher.

iv. Modal choice

3.18 As stated above, DSCs are designed to be readily transferable between transport modes, meaning there are a range of alternative methods by which a DSC may reach its final destination.

3.19 Once a DSC arrives at a deep sea port, regardless of whether merchant haul or line haul is utilised, the choice of onward transport is typically between road, rail, feeder ship (by way of 'short-sea' shipping) or a combination of these modes. The choice of mode depends on a number of factors; however, as outlined further in the section on market definition (at paragraphs 5.3 to 5.27 below) it is ORR's preliminary view that the principal drivers of modal choice are price and service quality.

3.20 Transport by road is carried out on heavy goods vehicles (**HGVs**) which are designed to facilitate the efficient loading and detachment of DSCs. HGVs are able to collect DSCs directly from the port and transport them directly to their final inland destination. HGVs are also used to complete shorter journeys to transport DSCs between inland rail terminals/feeder ports and their final destinations.

3.21 Feeder ships are significantly smaller than the large container ships used by shipping lines to transport DSCs to Great Britain from outside Northern Europe. Feeder ships are used to transport DSCs from the deep sea ports to smaller regional feeder ports (at which it would be uneconomical and/or impossible for large container ships to call at). Feeder shipping can take place from the Southern Ports or from alternative ports

in Northern Europe. Once DSCs are deposited at the regional feeder port they are transferred to rail, or more commonly road, for their onward journeys to their final destinations.

B. Suppliers of DSC rail transport services

3.22 One option for transporting DSC containers for part of the onward leg of their overall journey is by rail. By rail DSCs are transported on flatbed wagons which are hauled by locomotives. These wagons are specifically designed for the loading, unloading and carriage of DSCs. DSCs carried by rail are transported to inland rail terminals before being transferred to HGVs for the final stage of their journey to their intended destination.

3.23 ORR takes the view that rail tends to become more economical for journeys covering longer distances and where there is a sufficient critical mass of demand such that frequent rail services can be justified.

3.24 Providers of DSC rail transport services are known as Freight Operating Companies. The number of FOCs currently providing DSC rail transport services in Great Britain is relatively limited, with only three operators moving a significant amount of DSCs on a regular basis.¹³

i. Requirements to operate as a FOC

3.25 In order to provide DSC rail transport services, an operator requires:

- a licence to operate railway assets;
- the appropriate level of insurance;
- a safety certificate and to have the relevant safety management systems in place;¹⁴
- a track access contract with Network Rail for operation on the mainline infrastructure; and
- an agreement to enter the network at ports and terminals at either end of the journey and any other contracts for access to railway facilities which they or their customers do not own and are necessary for the operation of trains.

¹³ FOCs transport a wide range of other commodities which are not the focus of this investigation

¹⁴ Any FOC wishing to develop or maintain infrastructure, such as an inland rail terminal, also requires a safety authorisation. The requirements for certification and authorisation are set out in the Railway and Other Guided Transport Systems (Safety) Regulations 2006

3.26 Full guidance and information on the necessary steps to commence and/or expand an operation to provide freight transport services by rail is available on ORR's website.¹⁵

C. Customers of DSC rail transport services

3.27 The customer base of FOCs serving the DSC rail transport services sector is concentrated, with the vast majority of DSC rail transport services being provided to a limited number of shipping lines under the line haul model.

3.28 FOCs also sell DSC rail transportation services to freight forwarders and in some cases, under the merchant haul model, directly to large importers, though to a much lesser extent than to major shipping lines.

¹⁵ <http://orr.gov.uk/what-and-how-we-regulate/track-access/track-access-process/how-to-apply-for-track-access/access-for-freight-operators>

4. ORR's investigation

A. The investigation

i. The complaint

4.1 On 17 June 2013, ORR received a complaint about Freightliner's arrangements with its customers for the provision of DSC rail transport services.

Relevant markets and dominance

4.2 The complaint identified a number of markets for DSC transport within Great Britain in which, it argued, rail operated with only minimal competitive constraints from other possible modes of DSC transport (notably road and feeder). These routes were (in summary) between the two largest ports in Great Britain, Felixstowe and Southampton, and three separate key inland destinations: the Midlands, the North West and Yorkshire.

4.3 The complaint asserted that principally for reasons of price efficiencies, DSC transport services in these markets were 'rail only' or 'rail captive'. The complaint alleged that in each of these 'rail only' markets Freightliner was and remains in a dominant position. The complaint asserted that Freightliner enjoyed and continues to enjoy significant market power both in terms of shares of customer demand and in having superior levels of access to the infrastructure necessary in order to viably operate a DSC rail transport service, by virtue of being the incumbent operator.

Allegedly anti-competitive arrangements

4.4 The complaint alleged that Freightliner's arrangements with its customers for DSC rail transport services on the identified routes were exclusionary in nature and operated to foreclose FOC competitors from competing for customers' demand. The complaint alleged that these arrangements therefore amounted to an infringement of the Chapter I and II prohibitions in the Act and/or Articles 101 and 102 TFEU. The complaint further alleged that Freightliner was in the process of extending its allegedly exclusionary practices to routes to and from the new London Gateway port.

ii. Evidence and information gathering

Concurrency

4.5 On 14 August 2013, in accordance with Regulation 4(1) of the Competition Act 1998 (Concurrency) Regulations 2004 (the **Regulations**), ORR informed the Office of Fair

Trading (**OFT**)¹⁶ that it was proposing to investigate the allegations made by the complainant. On 15 August 2013, the OFT agreed that, pursuant to Regulation 4(2) of the Regulations, ORR was best placed to exercise prescribed functions and take the investigation forward.

Investigation

- 4.6 On 7 November 2013, having considered the complaint and gathered further intelligence, ORR launched a formal investigation under section 25 of the Act and undertook an unannounced inspection of Freightliner's premises on the same day. The investigation was launched on the basis that ORR had reasonable grounds to suspect that there were one or more markets within the DSC intermodal transport sector which might be captive to rail and that:
- Freightliner had entered into agreements and/or concerted practices which had as their object or effect the prevention, restriction, or distortion of competition contrary to the Chapter I prohibition and/or Article 101 TFEU; and/or
 - Freightliner held a dominant position within one or more relevant markets and had abused (and continued to abuse) such dominant position(s) by engaging in exclusionary conduct through one or more of its agreements with customers contrary to the Chapter II prohibition and/or Article 102 TFEU.
- 4.7 In March 2014, ORR determined that the investigation into suspected infringement of the Chapter I prohibition/Article 101 TFEU should be deprioritised. The investigation into whether Freightliner had engaged/continued to engage in conduct which amounted to an abuse of a dominant position continued.
- 4.8 The investigation into Freightliner's conduct continued between November 2013 and January 2015. In addition to analysing the material obtained at the unannounced inspection, ORR sent formal notices under section 26 of the Act to:
- Freightliner;
 - the complainant;
 - customers of DSC rail transport services (principally shipping lines); and
 - a number of organisations involved in the wider DSC transport sector.
- 4.9 In addition to utilising its formal investigatory powers, ORR also held a series of face-to-face meetings with customers and relevant organisations. During the course of the

¹⁶ The OFT was abolished on 31 March 2014. The competition enforcement functions relevant to this Notice were transferred to the newly established Competition and Markets Authority (the **CMA**) on 1 April 2014 by operation of the Enterprise and Regulatory Reform Act 2013 (**ERRA**). The Regulations were repealed by **ERRA**

investigation ORR provided Freightliner with regular updates as to progress through holding scheduled State of Play meetings.

B. Commitments discussions

- 4.10 At a scheduled State of Play meeting on 30 January 2015, Freightliner expressed an interest in opening discussions with a view to making an offer of formal commitments.
- 4.11 In accordance with ‘*Guidance on the CMA’s investigation procedures in Competition Act 1998 cases*’ (CMA8)¹⁷ and ‘*Competition Act Guideline: Application to Services Relating to Railways*’ (OFT430)¹⁸ following Freightliner’s initial contact and prior to entering into commitments discussions, ORR carefully considered whether commitments would be appropriate in this case.
- 4.12 Having considered all of the circumstances and the applicable policy, ORR considered that commitments could be an appropriate outcome to the case, such that it was appropriate to engage with Freightliner in commitments discussions. Specific reasons as to why commitments are considered appropriate in this case are set out at paragraphs 7.1 to 7.11 below.
- 4.13 A factor in this determination was consideration of whether ORR had gathered sufficient information and evidence to provide Freightliner with a summary of its competition concerns¹⁹ at that point in the investigation. ORR determined that it could, on the basis of evidence already collected, appropriately and reasonably articulate a summary of its competition concerns to Freightliner.
- 4.14 ORR provided a summary of competition concerns to Freightliner on 27 March 2015.²⁰ Commitments discussions took place between 27 March 2015 and 9 July 2015.

¹⁷ (March 2014) www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases

¹⁸ (October 2005) www.gov.uk/government/publications/railways-sector-legislation-application-and-enforcement; see also *Enforcement*, December 2004, (OFT407), www.gov.uk/government/publications/competition-law-application-and-enforcement

¹⁹ In accordance with paragraph 10.19 of CMA8

²⁰ In March 2015 ORR identified competition concerns relating to potentially anti-competitive reselling restrictions in agreements between Freightliner and its customers under Chapter I of the Act/Article 101 TFEU. For the avoidance of doubt, these concerns are separate from the previously de-prioritised investigation into potentially anti-competitive exclusionary agreements under Chapter I of the Act/Article 101 TFEU

i. The Initial Commitments

- 4.15 In July 2015 Freightliner proposed a set of commitments which, in ORR's provisional view at that time, fully addressed its competition concerns (the **Initial Commitments**). On 3 September 2015 ORR consulted on the Initial Commitments (the **First Consultation**). The First Consultation ran from 3 September 2015 to 1 October 2015. The representations received in response to the First Consultation and ORR's responses to those representations are set out in Annex B.
- 4.16 In light of responses to the First Consultation ORR held further commitments discussions with Freightliner.

ii. The Modified Commitments

- 4.17 On 12 November Freightliner offered a second set of commitments to ORR with a view to dealing with issues raised by the responses to the First Consultation (the **Modified Commitments**). The Modified Commitments contained amendments to the duration, geographic coverage and reporting requirements of the commitments. ORR formed the provisional view that the Modified Commitments fully addressed its competition concerns.
- 4.18 On 19 November 2015 ORR consulted on the Modified Commitments (the **Second Consultation**). The Second Consultation ran from 19 November to 27 November 2015.²¹ Representations received in response to the Second Consultation and ORR's responses are set out at Annex B.

iii. The Final Commitments

- 4.19 Having considered the representations received in response to the Second Notice ORR, through this decision, adopts the Modified Commitments as the Final Commitments.

²¹ Extensions to 2 December 2015 were provided to two respondents upon request

5. ORR's competition concerns

A. Introduction

- 5.1 This chapter sets out ORR's competition concerns regarding Freightliner's arrangements with its customers. ORR first sets out its preliminary view on market definition and Freightliner's position in the relevant markets, followed by its concerns about Freightliner's conduct in these markets.
- 5.2 It should be noted that the conduct set out in this chapter refers to both historical and current arrangements.²²

B. The Relevant Markets

- 5.3 ORR has reached the preliminary view that there are six relevant markets; namely, for the provision of DSC rail transport services *between* each of the following ports and terminals in inland regions (hereinafter collectively referred to as the **Relevant Markets**):

Between 'Southern Ports' and 'inland terminals in the North West'		
The port of Felixstowe	↔	Inland terminals in the North West
The port of Southampton	↔	Inland terminals in the North West
The port of Tilbury	↔	Inland terminals in the North West
Between 'Southern Ports' and 'inland terminals in Yorkshire'		
The port of Felixstowe	↔	Inland terminals in Yorkshire
The port of Southampton	↔	Inland terminals in Yorkshire
The port of Tilbury	↔	Inland terminals in Yorkshire

²² ORR's investigation focused on the time period from the start of 2011 onwards, that being the time when a number of the key agreements/arrangements that form part of ORR's competition concerns, were concluded

i. Approach to market definition²³

- 5.4 It is ORR's preliminary view, consistent with the European Commission's decisional practice²⁴ that not all modes of transport are generally substitutable for each other in view of the geographic situation of the customer as well as the specific characteristics of the goods to be transported. In the context of DSC rail transport services in Great Britain, in each geographic frame of reference there are usually three alternative modes of DSC transport services available; namely, road, rail and feeder (or a combination of these options).
- 5.5 Journey distance is a key factor in determining the mode of DSC transportation. ORR's view is that the traditional economics of haulage (of all commodities) dictates that, other things being equal, rail is relatively strong (that is, cost effective) over longer distances and relatively weak over shorter ones. This is because transportation by rail involves relatively high 'fixed' costs that do not vary with distance, including the costs of lifting at both ends of a journey, intermodal shift, and inland terminal access charges. ORR's investigation sought to establish whether there were any particular sub-national markets which were captive to rail given the key role played by distance.

ii. Relevant geographic markets

- 5.6 The nature of DSC transport services is inherently geographic; to serve end customers (principally retailers) DSCs need to be transported from point to point to facilitate economic delivery to the end customer.

Ports

- 5.7 ORR is of the preliminary view that it is appropriate for each of the Southern Ports, (Felixstowe, Southampton and Tilbury) to constitute separate 'ends'²⁵ of the relevant geographic markets. In any event, even if the Southern Ports were to a certain degree interchangeable, ORR considers that this would not impact the overall analysis of its competition concerns, since the conditions of demand and supply, including operators' shares, do not differ greatly by port of origin.
- 5.8 ORR excluded a number of other ports capable of handling DSC traffic in the South of Great Britain from the scope of its investigation because the volumes of rail-hauled

²³ For information on ORR's approach to market definition, see 'Market Definition' (OFT403), December 2004 <https://www.gov.uk/government/publications/market-definition> . This guidance was originally published by the OFT and has been adopted by the CMA

²⁴ See, for example, Case No COMP/M.5480 *Deutsche Bahn/PCC Logistics*, http://ec.europa.eu/competition/mergers/cases/decisions/m5480_20090612_20310_en.pdf

²⁵ The origin point for imports and the destination point for exports

DSCs routed through such ports was minimal. Measured by tonnage, Felixstowe, Southampton and Tilbury combined account for approximately 95% of the total rail DSC volumes routed through ports in the South of Great Britain.²⁶ One port excluded on this basis was London Thamesport. Another port excluded is London Gateway, which accounts for approximately 5% (by tonnage) of total rail-hauled DSC volumes routed through ports in the South of Great Britain. ORR considers that it is premature to draw any inferences about market power from the relative shares of FOCs of traffic in and out of London Gateway because the facility is still relatively new and currently retains spare capacity. London Gateway benefits from two independently controlled rail terminals and a double-tracked branch line facilitating access for FOCs to and from the port and to facilities within the port itself.

5.9 It is ORR's preliminary view that onward DSC transport services considerations do not have a material impact on decisions of shipping lines to switch between ports. This preliminary view is consistent with ORR's observations that: there is minimal switching between ports by shipping lines; shipping lines have a tendency to follow existing traditional route patterns which call at particular ports; and, customers often have long-term arrangements with individual ports. Only certain ports have the capability to handle the necessary DSC volumes required by shipping lines. Container ships typically make a single call in Great Britain to load or offload all of their DSCs bound for British inland destinations in order to avoid the costs associated with multiple stops.

5.10 ORR takes the preliminary view for these reasons that there is also limited interchangeability between the Southern Ports (which are calling points on existing networks) and alternative Northern European ports (such as Antwerp, Le Havre or Rotterdam).²⁷

Inland terminals

5.11 In ORR's preliminary view, it is appropriate to group together inland terminals within regions. The relevant regions in this case are the North West, Yorkshire and the Midlands. ORR has considered whether it would be appropriate to consider a broader geographic market than groups of inland terminals within specific regions. It is ORR's preliminary view that a broader frame of reference would not be appropriate. Road distances between the nearest terminals in neighbouring regions are significant and much larger than distances between terminals within regions. Analysis undertaken by ORR suggests that inland terminals are primarily utilised to serve downstream customers within the hinterland region in which they are situated.

²⁶ Data is for the year 2015 up to October. Data is for the year 2015 up to October. Source Paladin database, Network Rail

²⁷ An exception to this being DSCs bound for inland destinations in Scotland (see paragraphs 5.19 to 5.20, below)

ORR's preliminary view is that when considering onward DSC transport services customers view the market on a 'port-to-region' (and vice versa) basis.

iii. Relevant product markets

5.12 There are a number of advantages and disadvantages to DSC transport services by each of road, rail and feeder. These advantages/disadvantages vary in their degree when applied to different routes within Great Britain.

5.13 In defining relevant product markets, ORR has carefully considered how the relative advantages and disadvantages of each mode apply on particular routes.

Modal choice (general)

5.14 ORR's preliminary view, based on evidence gathered during its investigation, is that modal choice by shipping lines (and other customers where relevant) on each particular route or routes is principally dictated by price and service quality (primarily speed and flexibility) considerations.

5.15 Compared to rail, road offers greater service quality in some important respects (for example 'on-demand' flexibility). Rail has counterbalancing advantages in other areas, in particular reliability. ORR has not found any evidence to date to support a view that environmental factors play a key role in modal choice for shipping lines, though some shipping lines do choose to highlight their environmental credentials in advertising to their customers.

5.16 In undertaking its market definition exercise, ORR has had regard to the impact of the UK Government's Mode Shift Revenue Support (**MSRS**) scheme. The MSRS scheme provides subsidy for journeys where rail has been estimated to face a disadvantage vis-à-vis road haulage and where the environmental benefits of rail are highest. Of the regions referenced below, MSRS support is most significant for transport between the Southern Ports and the Midlands.

5.17 ORR's preliminary view based on its analysis is that the relative proximity of the Southern Ports to London and the South East means that DSCs being transported to these areas are moved almost exclusively by road. Road offers 'on-demand' flexibility to customers based in these regions. The short distances involved between the Southern Ports and the South East and London are insufficient for the efficiencies of rail to offset the high fixed costs associated with the use of that mode.

5.18 Importers and shipping lines also have the option to tranship DSCs by feeder ships from Northern European ports. The North West is, for example, partly served by feeder ships from Rotterdam, Antwerp and Le Havre to Liverpool.

5.19 In ORR's preliminary view feeder ships are particularly advantageous:

- where onward journeys involve especially long distances, such as are present between the Southern Ports and the Scottish inland destinations. In this particular example the availability of Scottish ports such as Grangemouth, mean that the economic case for transshipment from an alternative Northern European port is much more viable; and
- when serving parts of the country that are relatively close to a regional 'hinterland' feeder port. For example importers based in the North East of England utilise DSC feeder transport services calling at the feeder port of Teesport.

5.20 More broadly, however, the attitude of shipping lines and other customers to feeder shipping appears to vary. In ORR's preliminary view, though some customers view feeder as a cost effective alternative to rail and/or road, most customers who expressed a view to ORR expressed at least some degree of reluctance to use feeder services on a wide scale, citing disadvantages such as: considerably increased transit time; increased cost; reduced service frequency; and lower levels of reliability. It is ORR's preliminary view that shipping lines have firm tendencies to follow existing shipping patterns and to deposit DSCs ultimately bound for British inland destinations most commonly at a Southern Port.

5.21 ORR considers that these considerations explain the focus of the complaint on the transport of DSCs by rail between the Southern Ports and the key inland destinations of the Midlands, the North West, and Yorkshire. The distances involved in these journeys are referred to by the complainant as the "*golden triangle*" in which the distances and economies of scale involved make rail sufficiently efficient, both in terms of price and service quality, that it is not readily interchangeable with other modes of transport. ORR has carefully considered this assertion.

Routes between the Southern Ports and inland terminals in the Midlands

5.22 ORR is of the preliminary view that road acts as a sufficient competitive constraint on rail in markets between each of the Southern Ports and inland terminals in the Midlands for the relevant frame of reference for inland DSC transport services on these routes to include transport by road as well as rail.

5.23 The approximate distances between the port of Felixstowe and inland terminals within the Midlands region range between 200 and 270 kilometres²⁸; from the port of Southampton the approximate distances range between 200 and 240 kilometres. ORR is of the preliminary view that road and rail offer similar prices on these routes and over these distances. The relative advantages and disadvantages as between road and rail on these routes are finely balanced. Further, switching analysis

²⁸ The distances set out in paragraphs 5.23 to 5.27 are approximate distances by road

undertaken by ORR suggests, in ORR's preliminary view, that road and rail are to a significant degree interchangeable services/modes on these routes.

Routes between the Southern Ports and inland terminals in the North West

- 5.24 In ORR's preliminary view, neither road nor feeder constitutes a significant competitive constraint to rail on routes between each of the Southern Ports and inland terminals in the North West. From the port of Felixstowe, distances to inland terminals in the North West are typically over 410 kilometres; from the port of Southampton approximate distances range between 370 and 380 kilometres. These routes are of sufficiently long distance such that the efficiencies of rail (along with other factors) mean that in ORR's preliminary view DSC rail transport services are not readily substitutable with other modes of DSC transport.
- 5.25 It is ORR's preliminary view that rail has price advantages over road on these routes²⁹ and that insufficient switching to other modes would occur so as to incur a critical loss in the event of a small but significant non-transitory increase in price (SSNIP).³⁰

Routes between the Southern Ports and inland terminals in Yorkshire

- 5.26 In ORR's preliminary view, neither road nor feeder constitutes a significant competitive constraint to rail on routes between each of the Southern Ports and inland terminals in Yorkshire. From the port of Felixstowe, distances to inland terminals in Yorkshire range between 300 and 340 kilometres; from the port of Southampton these distances range between 340 and 380 kilometres. These routes, particularly where the inland terminal is situated towards the North and West of this region, (namely the terminals at Leeds, Wakefield and Selby), are of sufficiently long distance such that the efficiencies of rail (along with other factors) mean that, in ORR's preliminary view, DSC rail transport services are not readily substitutable with other modes of DSC transport.
- 5.27 It is ORR's preliminary view that rail has price advantages over road on these routes and that insufficient switching to other modes would occur so as to incur a critical loss in the event of a SSNIP.

²⁹ORR notes that the extent of these price advantages may fluctuate in response to changes in global oil prices, with advantages being more pronounced when global oil prices are relatively high (given the greater impact of this factor on road transport prices)

³⁰The SSNIP test determines whether a given increase in product prices would be profitable for a hypothetical monopolist in a candidate market

C. Freightliner's position on the Relevant Markets

5.28 ORR is of the preliminary view that Freightliner holds a dominant position in (i) markets for the provision of DSC rail transport services between each of the Southern Ports and inland terminals in the North West; and (ii) markets for DSC rail transport services between each of the Southern Ports and inland terminals in Yorkshire. It is ORR's preliminary view that as DSC road transport services are included in the markets between the Southern Ports and inland terminals in the Midlands, Freightliner does not currently hold a dominant position in those markets.

i. Market power

5.29 Since privatisation Freightliner, as the incumbent intermodal FOC, has maintained a consistently high share of the total UK intermodal rail sector in Great Britain. Freightliner's share of DSC rail transport services³¹ on routes between the Southern Ports and inland terminals in Yorkshire is approximately 60% and on rail routes between the Southern Ports and inland terminals in the North West is approximately 90%.³²

5.30 ORR notes that during the period of the investigation Freightliner has held 22 out of a total of 30 daily paths out of the port of Felixstowe³³ and operates 15 to 16 of the approximately 20 daily trains running from the port of Southampton. Furthermore, during the same period Freightliner owned and controlled access to a number of key terminal facilities at ports and inland destinations. ORR is of the preliminary view that this gave Freightliner significant advantages in terms of winning and retaining business in the Relevant Markets.

5.31 Freightliner has had long-term relationships with key customers in the intermodal sector which date back to pre-privatisation. Competitor FOCs have not had the benefit of such relationships.

Barriers to entry and expansion

5.32 ORR is of the preliminary view that the DSC rail transport services sector, and the Relevant Markets in particular, are characterised by high barriers to entry and expansion for actual or potential competitor FOCs.

³¹ Based on weight of DSCs transported

³² ORR has not considered it necessary to further delineate Freightliner's shares for each of the markets which have been separately identified on a preliminary basis. ORR is of the preliminary view however that in each such market Freightliner has a sufficient market share so as to be presumed to be dominant; namely, more than 50%

³³ These figures represent approximations for 2013 based on information currently available

- 5.33 Despite industry and regulatory mechanisms which are designed to support competing applications for infrastructure capacity³⁴, the unpredictability of outcomes in such situations where capacity is constrained and where there may be equally compelling business need by applicants, means that decisions on entry or expansion bear an element of risk. Success in any application for access to such infrastructure is uncertain and requires a willingness on the part of competitor FOCs to take a degree of risk.
- 5.34 It is ORR's preliminary view that in order to viably enter or expand in the Relevant Markets an actual or potential competitor FOC is likely to need to secure a certain minimum volume of business from customers in order to achieve necessary economies of scale and scope and to effectively service the demand of customers. In ORR's preliminary view actual or potential competitors FOCs must also secure a certain volume of demand from customers in order to have a sufficient platform on which to support a successful application for access to the necessary infrastructure.
- 5.35 It is ORR's preliminary view that the arrangements between Freightliner and its customers impose further artificial barriers to entry and expansion by actual or potential competitor FOCs, limiting opportunities for competition to occur on the merits.

Countervailing buyer power

- 5.36 It is ORR's preliminary view that customers do not possess buyer power sufficient to diminish Freightliner's alleged dominant position on the Relevant Markets. Any attempt to exert countervailing buyer power is likely to be constrained by the lack of alternative capacity in the Relevant Markets, namely, because in ORR's preliminary view Freightliner has significant advantages in terms of access to port facilities and mainline rail infrastructure such that customers seeking to obtain DSC rail transport services are left with limited option but to use Freightliner.
- 5.37 As stated above, in ORR's preliminary view DSC rail transport services are not readily substitutable with other forms of DSC transport in the Relevant Markets. As such, in ORR's preliminary view, notwithstanding the fact that many customers are international shipping lines, Freightliner's incumbency at key parts of the infrastructure, where capacity is already constrained, means that it is an unavoidable trading partner for a substantial part of the demand of many customers seeking services in the Relevant Markets.

³⁴ Principally access to mainline rail network capacity and facilities at ports and inland terminals

D. Conduct raising concerns

5.38 ORR's preliminary view is that certain arrangements Freightliner³⁵ has with its customers may restrict competition by foreclosing access to customers by actual or potential FOC competitors. As such, Freightliner's conduct in relation to its arrangements with its customers may, in ORR's preliminary view, amount to an abuse of a dominant position contrary to Chapter II of the Act/ Article 102 TFEU. These competition concerns apply in each of the Relevant Markets.

5.39 ORR is also concerned about the reselling restrictions in Freightliner's arrangements with its customers which go beyond safety or technical considerations.³⁶ The reselling restrictions identified were, in the preliminary view of ORR, potential separate infringements of Chapter I of the Act and/or Article 101 TFEU. However, ORR considers that the potentially anti-competitive reselling restrictions will be fully addressed by the Final Commitments. ORR is of the preliminary view that such restrictions may limit potential resellers of DSC rail transport services, thereby reinforcing the position of Freightliner as the principal distributor of such services. ORR is of the preliminary view that, where they exist, such reselling restrictions are a competition concern across all of Freightliner's agreements with its customers, that is, within and beyond the scope of the Relevant Markets.

i. Exclusionary conduct

5.40 ORR considers that where a supplier has a dominant position, arrangements which require customers to purchase all or most of their demand from a single supplier may restrict competition by foreclosing markets to competitors. ORR is of the preliminary view that Freightliner entered into arrangements with a number of its customers which may have an exclusionary effect. These arrangements are bespoke, vary in form and may be categorised into different types of exclusionary restrictions. In reaching this position, ORR notes its preliminary view that Freightliner was (and remains) an unavoidable trading partner for a substantial part of the demand of many customers seeking services in the Relevant Markets.

5.41 It is ORR's preliminary view that a number of arrangements Freightliner has or had with its customers may be of concern; these are arrangements which may:

³⁵ For convenience, reference is made to Freightliner but, for the avoidance of doubt, the conduct which gave rise to ORR's competition concerns relates solely to the intermodal business of Freightliner Limited in Great Britain

³⁶ See paragraphs 5.49 to 5.52, below

- involve minimum volume commitments (**MVCs**) which constitute all or most of a particular customer's demand. In ORR's preliminary view the majority of the potential foreclosure in the Relevant Markets is brought about by MVCs;³⁷
- constitute outright exclusive purchasing obligations, or have been interpreted or applied as such; and
- constitute loyalty-enhancing or exclusivity-inducing rebate arrangements where payments applied retrospectively to all volumes, or, prospectively (in a ratcheted manner) to future volumes and where (a) the targets for triggering such rebates were set individually by reference to a particular customer's demand; and (b) payments did not relate to the passing on of any objectively identifiable efficiency savings.

5.42 Examples of arrangements about which ORR has competition concerns include:

- contracts with customers containing MVCs which in ORR's preliminary view, both through the contractual provisions and through observation of volumes carried in practice, are/were effectively calibrated so as to capture all or most of a particular customer's total demand in the Relevant Markets. In ORR's preliminary view, some contracts containing MVCs are/were contained within contracts of significant duration which are often not made subject to open tender by customers when they come to be renewed. Certain contracts contain mechanisms to vary MVCs together with termination provisions; however ORR takes the preliminary view that there is minimal incentive to utilise such provisions and limited scope to use them for the purpose of switching demand to a competitor;³⁸
- an arrangement between Freightliner and a customer which may constitute an outright exclusive purchasing obligation. ORR is of the preliminary view that the contractual provisions between the customer and Freightliner amounted to an understanding that the customer would exclusively purchase its requirements in

³⁷Such MVC obligations typically contain 'take or pay' clauses/arrangements whereby customers must pay for the minimum capacity regardless of whether or not they use it. Customers are therefore incentivised to utilise all of their MVCs under the contract before considering placing any demand with an alternative supplier, or otherwise seeking to satisfy such demand on the flexible 'spot' market

³⁸ ORR is of the preliminary view that these provisions have never in practice been considered or utilised for the purpose of switching demand. ORR also notes the judgment of the General Court relating to the existence of termination clauses in Case T-286/09 *Intel Corp v Commission*, at paragraph 112 (citing Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, paragraph 73):

"As regards the argument based on the possibility of terminating contracts at short notice, the Court would point out that the right to terminate a contract in no way prevents its actual application, until such time as the right to terminate it has been exercised."

the Relevant Markets from Freightliner. In ORR's preliminary view the contract was of significant duration;

- one contract which, in ORR's preliminary view, contains a revenue target rebate arrangement, applied on top of MVCs, where the targets for payments of the rebate were set by reference to the customer's demand rather than objectively identifiable efficiencies. This arrangement may have exacerbated the overall potentially exclusionary nature of Freightliner's arrangement with that customer;
- an arrangement between Freightliner and a customer which may have constituted a loyalty-enhancing rebate scheme. ORR is of the preliminary view that:
 - the rebates were not designed to pass on objectively justifiable efficiency savings to the customer;
 - the target volumes at which rebates were triggered were set individually by reference to the customer's actual demand; and
 - the rebates were not paid only in respect of incremental volumes, but rather in respect of future volumes which created a ratcheted loyalty-inducing effect; and
- one arrangement between Freightliner and a customer, which in ORR's preliminary view may have constituted an exclusivity-inducing retrospective rebate arrangement. ORR is of the preliminary view that:
 - this arrangement involved Freightliner setting a 'business target' which constituted all or most of the customer's demand for DSC rail transport services in exchange for a 10% rebate across all volumes if this target was met; and
 - the rebate payments were not calibrated so as to reflect the 'passing on' of efficiency savings.

5.43 ORR considers that the potential for exclusionary arrangements to have an anti-competitive foreclosure effect is increased when they are contained within agreements of significant duration and/or within contracts with evergreen or rollover provisions. Some of the potentially exclusionary arrangements that Freightliner entered into with its customers fell, in ORR's preliminary view, into one or both of these categories.

5.44 In certain cases contracts with major customers containing arrangements of concern to ORR were not made subject to open tender by customers for significant periods of time.

Foreclosure effects

- 5.45 ORR is of the preliminary view that, when taken together, the MVC arrangements, the potentially exclusive purchasing obligations and certain rebate arrangements may foreclose a potentially significant part of the Relevant Markets to competition.
- 5.46 ORR estimates, on the basis of data currently available, that the cumulative effect of the exclusionary arrangements is that 30-40% of the total demand for DSC rail transport services on routes between each of the Southern Ports and inland terminals in Yorkshire is potentially foreclosed. In relation to routes between each of the Southern Ports and inland terminals in the North West, ORR estimates that 50-60% of the total demand is potentially foreclosed.³⁹
- 5.47 ORR is of the preliminary view that a significant proportion of total demand is therefore capable of being foreclosed in each of the Relevant Markets by the arrangements Freightliner has entered into with its customers. ORR is concerned that these exclusionary arrangements may have artificially raised barriers to entry by making it more difficult for actual or potential competitors to compete for demand in the Relevant Markets. This cumulative foreclosure effect is in ORR's preliminary view exacerbated by the fact that a number of the potentially exclusionary arrangements formed part of:
- contracts of long-term/significant duration;
 - contracts with regularly utilised evergreen/rollover clauses;
 - contracts with absolute restrictions on the resale of excess capacity;
 - contracts which were not regularly (or in some cases ever) made subject to competition; and
 - continued long-term relationships with many of the major customers for DSC rail transport services.
- 5.48 These features, in ORR's preliminary view, mean that opportunities for alternative FOCs to regularly compete for customers' demand on an open, competitive, and sufficiently frequent basis may have been considerably limited.

³⁹ ORR has not considered it necessary for the purposes of this decision to further break down this analysis as between the six separate routes identified above as it is ORR's preliminary view that the Final Commitments fully address its competition concerns in the Relevant Markets regardless of the levels of foreclosure on specific routes

ii. Limiting potential resellers of DSC rail transport services

5.49 ORR is of the preliminary view that Freightliner entered into certain arrangements with customers that prohibited or otherwise restricted the ability of customers to resell capacity of DSC rail transport services. Such arrangements included:

- restrictions on offsetting MVCs through resale to third parties;
- outright prohibitions on resale, either absolutely or to Freightliner's customers; and
- resale price maintenance (**RPM**), restricting customers from selling capacity to third parties at less than Freightliner's spot price.

5.50 ORR is concerned that such restrictions may have had an adverse effect on competition by limiting potential resellers of DSC rail transport services capacity and therefore artificially reinforcing the position of Freightliner as the principal provider of such services. ORR is concerned that this reinforcement may soften competition in downstream markets for the resale and trading of DSC rail transport services.

5.51 An example of a reselling restriction about which ORR has competition concerns is an agreement between Freightliner and one of its customers, in which the customer was restricted from:

- selling wagon space in competition with Freightliner;
- selling more than 10% of the available wagon capacity on a train;
- selling to regular customers of Freightliner; and
- selling space at less than the published Freightliner spot tariff applicable for the relevant route and for the relevant container size and weight.

5.52 ORR is of the preliminary view that the nature of such resale restrictions means that ORR's competition concerns in this regard are not limited to conduct within the Relevant Markets but extend to all agreements between Freightliner and its customers which contain/contained reselling restrictions.

iii. Effect on Trade

5.53 In ORR's preliminary view, where a dominant company's behaviour makes it more difficult for competitors from other member states to gain access to, or expand in

significant markets within Great Britain, trade between EU member states may be affected.⁴⁰

⁴⁰ See Commission Notice (2004/C101/07) Guidelines on the effect on trade concept contained in Articles 81 [now 101] and 82 [now 102] of the Treaty, paragraphs 97 to 99

6. The Final Commitments

A. Introduction

- 6.1 In order to address ORR's competition concerns, Freightliner has offered the Final Commitments to ORR.
- 6.2 The Final Commitments are binding on Freightliner and any other group companies involved in the provision of DSC rail transport services in Great Britain.
- 6.3 The Final Commitments will remain in force until 31 March 2019. Freightliner has committed to use all reasonable endeavours to ensure that contractual modifications or other actions required are completed within six weeks of the date on which the Final Commitments are accepted by ORR.

B. Geographic application

- 6.4 The Final Commitments which prevent Freightliner from placing any restrictions on customers reselling unused contractual capacity to third parties⁴¹ apply across all of Freightliner's contracts relating to routes in Great Britain and not just those contracts on routes within the Relevant Markets.
- 6.5 The remainder of the Final Commitments apply to all contractual arrangements entered into between Freightliner and its customers which contain an obligation to provide or take a number of wagons on routes between:
 - the port of Felixstowe and inland rail terminals in the North West;
 - the port of Southampton and inland rail terminals in the North West;
 - the port of Tilbury and inland rail terminals in the North West;
 - the port of Felixstowe and inland rail terminals in North and West Yorkshire;
 - the port of Southampton and inland rail terminals in North and West Yorkshire; and
 - the port of Tilbury and inland rail terminals in North and West Yorkshire.
- 6.6 "*North West*" refers to all terminals within Zone 11 of the Department for Transport's (the **Department's**) Intermodal Zone Map for calculating Modal Shift Revenue Support. As such, the term "*inland rail terminals in the North West*" includes, but is

⁴¹ See paragraph 6.14, below

not limited to: Freightliner's terminals in Manchester (Trafford Park) and Liverpool; the inland rail terminal owned by Eddie Stobart at Ditton; the Trafford Park terminal owned by DB Schenker; Barton Dock Road terminal; and the terminal at the port of Salford.

- 6.7 The term "*inland rail terminals in North and West Yorkshire*" refers collectively to all terminals within the ceremonial county boundaries of North and West Yorkshire, including but not limited to Freightliner's inland rail terminal in Leeds and the rail terminals at Wakefield and Selby.

C. Exclusivity

- 6.8 To address ORR's competition concerns about potential outright exclusivity, Freightliner has committed not to enter into any contracts which:

- require customers to purchase exclusively from Freightliner;
- require customers to purchase any given proportion of their total demand from Freightliner; or

- 6.9 To the extent that any of Freightliner's existing contracts with its customers contain any of the exclusivity provisions specified above, Freightliner has committed to write to the relevant customer and confirm that they are in fact not under such an obligation.

D. Minimum volume commitments (MVCs)

- 6.10 In order to address ORR's competition concerns about potentially exclusionary MVC arrangements being exacerbated by their inclusion in long-term contracts and/or contracts containing automatic roll-over clauses, Freightliner has committed:

- not to enter into any contracts for a duration of more than five years;
- for any existing contracts with a duration of more than five years, to provide the customer with a unilateral right to terminate the contract on the fifth anniversary, by providing at least six months' notice in writing to Freightliner;
- to remove all clauses in its contracts which provide for automatic rollover. Freightliner has also committed not to include such automatic rollover clauses in any new contracts with customers; and
- to remove any clauses in contracts between Freightliner and its customers which prohibit customers from informing alternative FOCs of the end dates of their contracts with Freightliner.

6.11 Freightliner has committed to providing all customers that enter into contracts including MVCs with a duration of more than three years (including current contracts) with a unilateral and unconditional right to reduce their contracted wagon commitment by:

- 10% on the third anniversary of the contract; and
- an additional 10% on the fourth anniversary of the contract,

6.12 However where Freightliner enters into a contract with a customer following an open, non-discriminatory, advertised tender for the business, or provides evidence to ORR that the customer has approached at least one competitor FOC in writing, the commitment on contractual volume release will not apply.

E. Rebates

6.13 With a view to addressing ORR's competition concerns on potentially loyalty-inducing/exclusivity rebates, Freightliner has committed:

- not to enter into any discount or rebate arrangements which relate retrospectively to volumes already purchased or which require customers to purchase exclusively, or a given proportion of, their wagon requirements from Freightliner; and
- not to enter into any discount or rebate arrangements by which the price, rebate or discount in one period depends upon the volume purchased from Freightliner in an earlier period.

F. Reselling Restrictions

6.14 To address ORR's competition concerns about restrictions placed by Freightliner on the reselling of spare capacity, Freightliner has committed not to enter into any contracts which place any restrictions or conditions on customers reselling unused contract capacity to third parties, save only where such restrictions or conditions are justified by safety concerns.⁴²

G. Reporting requirements

6.15 Within the first two months of the date on which the ORR formally accepts the commitments, Freightliner will submit to ORR an implementation report. This report will enable ORR to monitor the extent to which the Final Commitments have been implemented. Freightliner will also deliver an annual compliance statement to ORR, for each period of 12 consecutive months during the term of the Final Commitments.

⁴² As per paragraph 6.4, above, this commitment applies both within and beyond the Relevant Markets

The annual compliance statement will be submitted to ORR within three months after the end of the year to which the report relates. This obligation will expire following delivery of the annual compliance statement relating to the last 12 month period for which the commitments were in force.

- 6.16 Freightliner will also submit, on a quarterly basis, a report which will provide data on the volumes of containers carried by Freightliner in that quarter under contracts with a duration of more than one year. The data will be provided both in absolute terms as well as relative to the total volume of containers carried by Freightliner otherwise than under contracts of more than one year's duration. This commitment will expire following delivery of the quarterly report relating to the last full quarter for which the commitments were in force.
- 6.17 The implementation report, annual compliance statement and the quarterly report shall each be signed by a senior executive of Freightliner Ltd who has delegated authority from the board of Freightliner. Each such report shall be duly presented to, and minuted at, a board meeting of Freightliner Group Limited.

7. ORR's assessment of the Final Commitments

A. ORR's assessment of the appropriateness of this case for commitments

i. The applicable guidance

- 7.1 ORR has had regard to the guidance for the time being in force in reaching its decision to accept commitments in this case.⁴³ As a concurrent competition authority the decision to accept commitments is at ORR's discretion.⁴⁴
- 7.2 ORR's Guideline⁴⁵ states that ORR is likely to consider it appropriate to accept binding commitments only in cases where (a) the competition concerns are readily identifiable; (b) the competition concerns are fully addressed by the commitments offered; and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.⁴⁶
- 7.3 The relevant guidance states that ORR will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern, and/or where ORR considers that not completing its investigation and making a decision would undermine deterrence.⁴⁷ The guidance also states that ORR will not accept commitments in cases involving a serious abuse of a dominant position.⁴⁸

⁴³ Section 31D(8) of the Act

⁴⁴ It should be noted that ORR is required, pursuant to Regulation 9(c) of the Competition Act 1998 (Concurrency) Regulations 2014, which replaced the Regulations as of 1 April 2014, to share a draft of any commitments which ORR proposes to accept under section 31A of the Act with all competition authorities who have concurrent jurisdiction in the relevant case before those commitments are accepted. As stated above, in this case in accordance with paragraph 3.49 of the *Regulated Industries Guidance on concurrent application of competition law to regulated industries*, (March 2014) (CMA10), ORR shared a draft of the First Consultation (with the Initial Commitments), the Second Consultation (with the Modified Commitments) and this decision (with the Final Commitments) with the CMA in order for the CMA to provide comments and guidance to ORR

⁴⁵ ORR has also, in accordance with OFT430 and section 31D(8) of the Act, had regard to *Enforcement*, (December 2004), (**OFT407**) and CMA8, both of which contain guidance on commitments policy and procedure

⁴⁶ Paragraph 4.33 of OFT430; see also paragraph 4.3 of OFT407 and paragraph 10.16 of CMA8

⁴⁷ Paragraph 4.33 of OFT430; and paragraph 4.5 of OFT407

⁴⁸ Paragraph 4.34 of OFT430; paragraph 4.4 of and Annexe A to OFT407; and paragraph 10.17 of CMA8

ii. ORR's assessment of this case

7.4 ORR considers that this is an appropriate case for commitments for the following reasons:

- **The competition concerns are readily identifiable:** Although the arrangements between Freightliner and its customers are varied and bespoke, ORR considers that common themes and practices, as summarised above, can be identified. As set out above, ORR is concerned that Freightliner's conduct was capable of foreclosing competition in the Relevant Markets.
- **ORR is satisfied that the commitments offered by Freightliner fully address its competition concerns:** The commitments will ensure that Freightliner's arrangements with its customers will not operate to foreclose access to customers by actual or potential FOC competitors in any of the Relevant Markets, for example, by removing and prohibiting outright exclusivity, limiting contracts to a maximum duration of five years, including options for customers to reduce their wagon commitments at the third and fourth anniversaries of contracts containing MVCs, prohibiting loyalty-inducing rebate practices, and prohibiting restrictions on resale of capacity. An explanation of why these commitments fully address ORR's concerns is set out in paragraphs 7.12 to 7.69 below.
- **The commitments offered are capable of being implemented effectively and within a short period of time:** The commitments will come into force as of the date of this decision. Freightliner has committed to use all reasonable endeavours to ensure that any contractual alterations or other actions required under the commitments are completed within six weeks of the date on which ORR formally accepts the commitments.⁴⁹ ORR therefore considers that the commitments will be implemented at the latest within six weeks or as soon as possible afterwards, with customers being notified in writing of changes being made to their contracts and/or their arrangements with Freightliner.

7.5 It is ORR's assessment of the seriousness of an abuse and its effect on competition which will be taken into account in determining whether commitments are appropriate in the context of a particular case. This assessment is made on a case by case basis, taking into account all the circumstances of a case. In taking a view here, ORR has considered such matters as: the nature/category of the conduct; the nature of the relevant service; the structure of the market; the market shares of the undertakings

⁴⁹ ORR notes in this regard that the contract alterations require no more than Freightliner to grant unilateral rights to its customers: customers would not be burdened with additional obligations of their own or otherwise disadvantaged by virtue of the commitments

involved; the entry conditions and the effect on competitors and third parties; and the direct or indirect impact on consumers.

7.6 ORR notes that the alleged conduct that it identified did not include predatory pricing, which is generally considered to be a 'serious' abuse of a dominant position.⁵⁰ ORR notes that a substantial majority of the potential foreclosure in the current case is, in ORR's preliminary view, brought about by MVCs. Where MVCs do not lead to market foreclosure, they are considered to be a legitimate commercial practice.⁵¹ ORR also notes, and has had regard to the fact, that the CMA and the EC have accepted commitments in cases involving alleged exclusionary conduct.⁵²

7.7 In the context of the current case ORR notes, in relation to market shares and the market structure,⁵³ that in its preliminary view Freightliner does have significant market shares in the Relevant Markets and does benefit from incumbency advantages, particularly in relation to access to infrastructure. Set against these considerations, however, are the following factors:

- whilst Freightliner does have certain incumbency advantages in relation to access to infrastructure, this is subject to a direct regulatory regime giving competitors a presumption of a right to access and a right of appeal to ORR;⁵⁴ and
- the levels of market foreclosure, whilst potentially abusive, have nonetheless allowed competitors to compete for, and win, some demand from customers. ORR notes that some market entry has been possible in the Relevant Markets, particularly in relation to routes between the Southern Ports and Yorkshire.

7.8 ORR is satisfied that its decision to accept commitments and discontinue its investigation will not undermine deterrence. ORR considers that the positive changes Freightliner will be required to make to the way it does business with its customers should send strong signals as to the appropriateness or otherwise of certain practices, thus adding to the deterrent effect of competition law. ORR considers that

⁵⁰ OFT430 paragraph 4.34, footnote 77, specifically cites that "*predation would generally be regarded as a serious abuse*"

⁵¹ Respondents confirmed with ORR in face to face meetings that MVCs were a recognised standard practice in the rail freight sector

⁵² See, for example: CE/9496-11 Supply of service, maintenance and repair platforms: Decision to accept commitments offered by epyx Limited and FleetCor Technologies, Inc., decision of 9 September 2014; MP-SIP/0034 Western Isles Road Fuels Decision to accept binding commitments from Certas Energy UK Limited and DCC plc, decision of 24 June 2014; Case COMP/B-1/37966 Distrigaz, decision of 11 October 2007; Case COMP/39.386 Long-term Contracts in France (EdF), decision of 17 March 2010

⁵³ These factors are specified in OFT430, paragraph 4.34 as matters which should be taken into account

⁵⁴ See Annex B paragraphs 9 to 32 for more information on the relevant regulatory access regimes in this case

setting out its competition concerns in this decision will also act as a signal as to the types of issues in relation to which ORR may take steps in future to promote effective competition.

7.9 ORR notes that Freightliner has cooperated throughout the course of the investigation, giving ORR an indication early in the process that it wished to offer commitments with a view to resolving ORR's competition concerns. ORR also notes that Freightliner has adjusted its conduct on the Relevant Markets since the commencement of the investigation, for example by: removing many of its potentially anti-competitive rebate practices; reducing volumes under long-term contracts; and removing clauses which require specified proportions of demand to be purchased in on-going negotiations with a particular customer. As such, ORR's investigation has already brought about changes even before any commitments have been accepted. In the circumstances, ORR considers that accepting commitments would not undermine the deterrent effect of competition enforcement.

7.10 ORR further considers that accepting commitments in this case ought to result in market changes more quickly than if ORR were to continue with its investigation.

7.11 In all the circumstances, therefore, ORR is of the view that the acceptance of commitments is appropriate. ORR also considers that, having had regard to the relevant guidance, it has appropriately discharged its duties under section 4 of the Railways Act 1993 to the extent it is required to do so.⁵⁵

B. ORR's assessment of why the Final Commitments fully address its competition concerns

7.12 ORR has carefully considered the Final Commitments and has formed the view that they fully address its competition concerns.

7.13 ORR considers that whilst natural barriers to entry to the Relevant Markets may remain high, the Final Commitments will operate to ensure that Freightliner's arrangements with its customers do not impose further potential artificial barriers to entry or expansion for actual or potential competitor FOCs.

7.14 Freightliner's arrangements with its customers are bespoke and vary in form. Notwithstanding this, the range of arrangements can readily be categorised into discrete concerns. For the reasons set out below, ORR considers that its competition

⁵⁵ Pursuant to section 4(7A) and (7B) of the Railways Act 1993, when exercising its concurrent powers under the Act, ORR may only have regard to the duties imposed on it by section 4 of the Railways Act 1993 if it is a matter that the CMA could have regard to when exercising that function. ORR also notes that no particular representations were made as to compliance by ORR with its duties under section 4 of the Railways Act 1993

concerns are fully addressed by the Final Commitments when the combined effect of the Final Commitments is considered.

7.15 ORR has also had regard to actual and possible future developments in the DSC transport sector and the Relevant Markets in reaching its decision that the Final Commitments fully address its competition concerns. In particular ORR has had regard to:

- the impact of London Gateway on the Relevant Markets (see paragraphs 7.55 to 7.56);
- the imminent opening of Liverpool II (see paragraph 7.57); and
- Freightliner's representations as to the reductions in volumes of DSCs carried under contracts of over 12 months' duration (which are to be monitored on a quarterly basis through the reporting provisions).

i. Outright exclusivity

7.16 Through the operation of the Final Commitments, customers will be clear that they are under no obligation to purchase their entire demand or even a specified proportion of their demand for DSC rail transport services on the routes within the geographic scope of the commitments from Freightliner.

7.17 The absolute prohibition on the use of both outright exclusivity restrictions and restrictions requiring the purchase of specific proportions of demand is applicable regardless of the duration of contracts. As such, even very short term contracts will allow scope for customers to consider using alternative FOCs even if they take the view that Freightliner is an essential trading partner for at least some of their demand. The Final Commitments also make clear that contractual arrangements suggesting that prioritisation should be given to Freightliner for additional or future volumes have no force in practice.

7.18 ORR considers that this will achieve significant transparency gains in the Relevant Markets where uncertainty as to the extent to which the arrangements between customers and Freightliner may be interpreted as exclusive may have led to reluctance on the part of customers to place volume with alternative suppliers, with, in ORR's preliminary view, the consequence of weakening the intensity of competition within the Relevant Markets. The Final Commitments make clear that Freightliner will not be able to act or treat customers on the basis that their arrangements amount to outright exclusive supply agreements.

ii. Minimum volume commitments

7.19 ORR considers that some degree of MVC is permissible provided that the extent of such MVCs, either in individual contracts or cumulatively, across the Relevant

Markets, do not operate so as to anti-competitively foreclose actual or potential competitor FOCs from entry or expansion. Indeed ORR recognises that a certain level of MVC is desirable for both customers and suppliers and may lead to efficiencies; in particular it allows for a reasonable degree of business planning (such as making applications for access to infrastructure and investment in required staff/locomotives) on the part of the service supplier.

7.20 The potential for MVCs to have anti-competitive foreclosure effects increases in cases where they are underpinned by take or pay arrangements which are so high that competitors are unable to compete practically for any of that customer's demand, or only for token amounts of that demand. As outlined above, ORR is of the preliminary view that the potentially exclusionary effects of the MVCs identified in this case (prior to the implementation of any commitments) are exacerbated by their inclusion in contracts of: long duration; containing evergreen clauses; and containing resale restrictions preventing the off-setting of excess demand.

7.21 ORR considers that the Final Commitments will operate so as to reduce the potentially exclusionary effects of MVCs to the extent that they will not be capable of having an anti-competitive foreclosure effect on actual or potential FOC competitors in the Relevant Markets. The Final Commitments achieve this through removing or significantly reducing each of the 'exacerbating factors', namely by (for routes within the geographic scope of the commitments):

- prohibiting the use of, and immediately removing, evergreen clauses;
- limiting the duration of contracts containing MVCs to five years;
- allowing for the release of 10% of contracted volumes on the third and fourth anniversaries of contracts of over three years' duration; and
- prohibiting the use of, and immediately removing, any restrictions on the resale of excess demand.⁵⁶

7.22 Further details on how these factors have been removed, or significantly reduced, is set out below.

Prohibition and removal of evergreen clauses

7.23 The Final Commitments will prevent contracts containing MVCs, regardless of duration, from rolling over. As stated above, ORR is concerned that custom and practice in the Relevant Markets may have led to many contracts being allowed by

⁵⁶ This applies to all of Freightliner's contracts, i.e. it is not limited to the narrower geographic scope set out at paragraph 6.5 to 6.7 above

customers to automatically renew without the demand serviced by those contracts being made subject to regular competition.

7.24 ORR understands in this regard that, of Freightliner's total share of demand in the Relevant Markets, 35-45% is currently held in contracts over 12 months' duration. This percentage will be monitored carefully (see below). The remaining percentage of 55-65% supplied under spot arrangements⁵⁷ or contracts of a duration of 12 months or less, will, in ORR's view, either be immediately subject to competition or, at a minimum, available to competition annually. ORR considers that the commitments will increase the frequency and scale of opportunities for competitors to compete for significant proportions of customers' demand in the Relevant Markets.

7.25 ORR considers that customers approaching the end of their contracts will have a greater incentive to consider using alternative FOCs for all or some of their demand rather than simply relying on existing agreements automatically continuing for many years.

Limitations on the duration of contracts and volume release

7.26 The Final Commitments operate to limit Freightliner's contracts containing MVCs to a maximum duration of five years.

7.27 For contracts of over three years' duration which contain MVCs, the Final Commitments require an option to release capacity on the third and fourth anniversaries of the contract. This option for customers to switch up to 10% of committed volumes on the third and fourth anniversaries will be written into contracts, meaning it is likely to be applicable beyond the end of the term of the commitments.

7.28 ORR understands that all of the volumes within Freightliner's long-term contracts will fall to be renewed or be available to be switched away from Freightliner within the three year duration of the commitments. Given the cumulative effect of the commitments regarding the removal of evergreen clauses, resale restrictions and rebates (see further below), ORR considers that a significant amount of volume currently carried by Freightliner will become available for competitive bidding during the term of the commitments. Indeed ORR understands, due to the dates on which Freightliner's contracts will (under the commitments) expire, that within 12 months of the operation of the commitments at least 50% of volumes currently carried by Freightliner will have been out of contract and by the end of 24 months, 100% will have been out of contract.

⁵⁷ In this document we use the term 'spot' to refer to arrangements for the transportation of specific consignments of DSCs without wider commitments on either side. In the rail freight industry they are often supported by rate cards which set prices for a particular period of time, periodically agreed between FOCs and shipping lines

7.29 Further contractual volumes will likely become available to competition even after the expiry of the commitments, due to the inclusion of the mandated 10% volume release requirements within all of Freightliner's relevant contracts with its customers concluded within the duration of the Final Commitments.⁵⁸

7.30 ORR considers that the commitments will create more opportunities for actual and potential competitors to compete for volumes of demand sufficient to viably enter or expand in the Relevant Markets.

Carve-out

7.31 The commitments to release volume at the third and fourth anniversaries of contracts including MVCs do not apply to contracts that are secured by Freightliner either following an open tender or following a process by which at least one competitor FOC is approached by the customer in writing.

7.32 ORR considers the scope of this carve-out to be relatively limited – it applies only to the volume release commitment and not to the remainder of the commitments package. For example, arrangements concluded by Freightliner following open tender or contact with an alternative FOC may not contain outright exclusivity requirements or loyalty-inducing rebates.

7.33 ORR considers that provided the contract is exposed to legitimate competition on the merits, any reduction in competition caused by the loss of the volume release requirements is sufficiently mitigated. ORR considers that the use of open tenders, or at least the approach of contacting rival FOCs prior to concluding contracts, is a useful way to achieve open and transparent competition between rival FOCs. ORR considers that any additional incentive created by the commitments and the carve-out in particular, either to engage in open tender or approach competitor FOCs, will be consistent with the objective of creating an environment for competition to take place on the merits.

7.34 ORR has considered the potential for there to be differing interpretations of what is or is not an open tender and what constitutes an 'approach' to a competitor FOC. ORR has also considered whether any such differences in interpretation could lead to circumvention of the volume release commitment. ORR considers that the risk of circumvention is sufficiently mitigated by the requirements placed on Freightliner to provide evidence to ORR that the requirements of the carve-out and its objectives

⁵⁸ This will be the case unless customers decide to revoke this right to volume release immediately or soon after the expiry of the commitments. ORR considers that customers are unlikely to be incentivised to do so. ORR notes that should any exclusionary practices be introduced by Freightliner following the expiry of the commitments, it will be open to ORR to take enforcement action in the future if there are reasonable grounds for suspecting that conduct amounts to an infringement of competition law (section 25 of the Act)

are met (i.e. to ensure that active competition has taken place), before being discharged from the volume release commitment.⁵⁹

Overall impact of the commitments relating to MVCs

7.35 Based on ORR's understanding of the current volumes in contracts of over 12 months' duration, ORR is satisfied that the Final Commitments will operate to ensure that sufficient volumes of customers' demand will be open to competition either immediately or within 12 months.

7.36 ORR considers that the limitation on duration, the prohibition on the automatic rollover of contracts and the required volume release in contracts of over three years' duration containing MVCs will increase the frequency with which volume is released to the market, presenting alternative FOCs with regular opportunities to compete for customers' demand.

iii. Rebates

7.37 The Final Commitments, in clear terms, operate to prohibit the use of loyalty-inducing rebate practices. The Final Commitments will also operate to prohibit the use of rebates which apply retrospectively to all volumes once a target is hit and those which, once a target is achieved, are applied to future volumes and can thereby lead to a ratcheted effect over time (i.e. granting discounts in future periods for hitting targets in earlier periods).

7.38 ORR understands that Freightliner has eliminated the vast majority of such practices during the course of ORR's investigation; although ORR will continue to monitor this through the reporting requirements.

iv. Resale restrictions

7.39 ORR considers that the commitment to remove resale restrictions⁶⁰ including RPM will prevent Freightliner from building such resale restrictions into any future contracts and ensure that these restrictions are immediately disapplied in existing contracts. ORR considers that this will fully address its competition concerns by removing any artificial reinforcement of Freightliner's position as the principal supplier of DSC rail transport services capacity and any exacerbating effect restrictive resale clauses may

⁵⁹ For the avoidance of doubt, the requirement to provide evidence does not constitute authorisation or approval for the exchange of commercially sensitive information between Freightliner, its customers and competitors. Any evidence that the carve-out has been engaged should be provided to ORR without any risk of engaging in such information-sharing. Ideally evidence that the carve-out is applicable should be provided directly to ORR by the relevant customer (albeit likely at the request of Freightliner)

⁶⁰ Across Freightliner's arrangements with customers for all routes in Great Britain and not just routes in the Relevant Markets

have had on MVC arrangements preventing customers from reselling excess DSC rail transport service capacity.

v. Geographic scope

7.40 The commitments that relate to resale restrictions apply across all of Freightliner's contracts relating to routes in Great Britain. ORR considers that this is appropriate to fully address ORR's competition concerns about such provisions, which, due to their nature, are a competition concern both within and beyond the Relevant Markets.

7.41 The commitments that address ORR's competition concerns about potentially exclusionary conduct are applicable to routes between certain ports and inland terminals within specified regions.

Inland terminals

7.42 Following the First Consultation, the geographic scope of the commitments in relation to inland terminals was extended.

7.43 In terms of the North West, the commitments now apply comprehensively to all terminals within that region.⁶¹ As such, ORR considers that the Final Commitments fully address its competition concerns on routes going to and from terminals in the North West.

7.44 In relation to Yorkshire, the Final Commitments fully address ORR's competition concerns by extending to all terminals in the administrative boundaries of North and West Yorkshire. First, the scope of the Final Commitments covers those parts of Yorkshire where DSC rail transport service providers face weaker competitive constraints from road hauliers.⁶² Secondly, the Final Commitments apply directly to a large proportion of Yorkshire traffic (in 2013 over two thirds of Freightliner's Yorkshire-bound import tonnage was destined for Leeds).⁶³

7.45 In light of the above, ORR considers that the geographic coverage of the Final Commitments in relation to inland terminals is sufficient to fully address its competition concerns.

⁶¹ Namely Zone 11 (the North West Zone) of the Department Intermodal Zone Map for calculating MSRS

⁶² In contrast with routes to and from terminals towards the South of the Yorkshire region, such as Doncaster, where ORR's preliminary view is that the competitive constraint of road against rail is increased. Notably, the one-way road distance between Felixstowe and Doncaster terminals is approximately 50km shorter than between Felixstowe and Leeds

⁶³ Data is for the year 2015 up to October. Source: Paladin database, Network Rail

DSC ports

- 7.46 ORR considers that the application of the Final Commitments to routes to and from each of the Southern Ports is sufficient to fully address its competition concerns in the Relevant Markets.
- 7.47 The Southern Ports are the areas in which ORR has identified competition concerns due to the specific competitive conditions identified at those ports, notably in relation to access to rail infrastructure and incumbency advantages enjoyed by Freightliner. ORR notes that combined, the Southern Ports accounts for approximately 95% of the total DSC volume transported by rail (measured by tonnage) routed through ports in the South of Great Britain.

vi. Duration of commitments

- 7.48 ORR considers that applying the Final Commitments until 31 March 2019 will provide a sufficient period of time to allow competitors the opportunity to capture volume that becomes free of contractual arrangements with Freightliner during the term of the Final Commitments. The active existence of competitive opportunities within the Relevant Markets has the potential to change the way that business is concluded and encourage greater switching in the future by customers.
- 7.49 As outlined above, there are a number of steps which an organisation must take before it can viably commence providing, or expand its provision of, DSC rail transport services. ORR considers that the Final Commitments provide a reasonable period of time for an actual or potential competitor, should it successfully win demand from customers on the merits, to start delivering competing DSC rail transport services in the Relevant Markets.
- 7.50 One such step is obtaining access to infrastructure. ORR considers that the duration of the Final Commitments, which Freightliner extended by three months in light of representations received in response to the First Consultation has regard to the current timescales for the planned improvements to the regulatory access regimes⁶⁴ applicable at the Southern Ports. ORR considers that the duration of the Final Commitments provides for these improvements to be implemented and take effect in sufficient time for FOCs to take full advantage of the release of customer demand by the Final Commitments and start delivering competing DSC rail transport services.
- 7.51 ORR considers that the duration of the Final Commitments is sufficient to allow switching. ORR notes in this regard that the market is not reliant on new entry to achieve effective competition; there are a number of active FOCs who, within a

⁶⁴ See paragraphs 9 to 32 of Annex B for further discussion of the relevant regulatory access regimes and paragraphs 45,46 and 70 of Annex B for information about why ORR considers the duration of the commitments has regard to improvements to the regulatory access regimes

limited period of time, could provide effective competition within the Relevant Markets. These competitors have extensive experience of the commercial and regulatory regimes. The duration of the Final Commitments gives these competitors sufficient time to expand into the Relevant Markets to provide a competitive alternative to Freightliner.

7.52 ORR considers that removing contractual restrictions on the disclosure of end dates of contracts will improve transparency in the Relevant Markets. ORR considers this will enable competitor FOCs to focus their sales activities on targeting the volume released as a result of the Final Commitments whilst they remain in operation, maximising their ability to compete for customer demand.

7.53 ORR also notes the possible impacts of London Gateway and Liverpool II, discussed further below, and considers that the duration of the Final Commitments is a reasonable timeframe over which to assess the impact on the Relevant Markets, if any, of the additional capacity that becomes available as a result of these developments. Through the reporting requirements and its statutory duties as a concurrent competition authority, ORR will continue to monitor developments in the Relevant Markets and the DSC rail transport sector more generally. In this regard ORR considers that it has sent clear signals as to the appropriateness or otherwise of certain types of conduct in this sector. ORR will remain vigilant and will carefully consider engaging its enforcement powers in the future, if, after the expiry of the Final Commitments, it suspects that provisions such as those identified in this decision are utilised in the Relevant Markets or the DSC rail transport sector more widely.

vii. Developments in markets

7.54 As stated above, in considering the Final Commitments, ORR has had regard to developments in the wider DSC transport sector, in particular when considering what a reasonable duration of commitments would be. In this regard the key developments are the opening of the London Gateway and Liverpool II ports.

7.55 The first ship called at London Gateway in late 2013.⁶⁵ ORR's understanding is that as yet London Gateway is still a small player relative to the ports of Felixstowe and Southampton. Road and rail distances from London Gateway to key population centres such as those in the Relevant Markets are, however, comparable to distances from Felixstowe.

7.56 ORR understands that rival FOCs have managed to secure some demand of major customers emanating from London Gateway going to key inland destinations. Whilst

⁶⁵ See www.londongateway.com/media-page/press-releases/britains-new-gateway-global-trade-dp-world-london-gateway-port/

Freightliner does operate from London Gateway, ORR understands that Freightliner's current arrangements with its customers for DSC rail transport services to and from this port are materially different to those in place at the Southern Ports, and, in ORR's preliminary view, are not likely to result in the foreclosure of competitor FOCs. ORR is of the preliminary view that issues about constrained capacity, and Freightliner's advantages in this regard, which may exist at the Southern Ports are not present at London Gateway, where there is excess DSC rail transport capacity available for utilisation by alternative FOCs.

7.57 Further DSC capacity will become available early in the operation of the Final Commitments, via the new Liverpool II container terminal,⁶⁶ which will be an extension to the existing Seaforth Dock container terminal operated by Peel Ports. This investment has the potential to particularly affect competition on the routes between inland terminals in the North West and the Southern Ports.

7.58 The impact of these developments in Great Britain's port infrastructure on the Relevant Markets is as yet unclear. Nonetheless ORR considers that they have the potential to have a significant effect on: the dynamics of the DSC transport sector in Great Britain; the Relevant Markets; and the effects of Freightliner's behaviour within the Relevant Markets. ORR therefore considers it is important to monitor carefully any changes in the Relevant Markets, and it considers that the duration of the Final Commitments is reasonable and appropriate so as to account for the fact that the DSC transport sector may be subject to considerable change within this period.

viii. Reporting requirements

7.59 The Final Commitments place significant reporting requirements on Freightliner. The requirement to provide annual compliance statements ensures that ORR is provided with a regular overview of compliance with the term of the Final Commitments.

7.60 ORR considers that the fact that statements required by the reporting requirements will have to be authorised by a senior executive of Freightliner (authorised on each occasion by the full Board of Freightliner Group Limited) will ensure that there are appropriate levels of accountability in relation to the accuracy of returns issued by Freightliner.

Quarterly data statements

7.61 The quarterly data statements allow ORR to carefully monitor volumes in contracts of more than 12 months' duration.

7.62 One factor influencing ORR's view that the Final Commitments fully address its competition concerns is the percentage of overall customer demand serviced by

⁶⁶ See <http://peelports.com/liverpool2>

Freightliner that is subject to contracts of more than 12 months' duration (c.35-45%). ORR will carefully monitor data provided in relation to this issue. ORR will regularly consider, should the percentage of volumes in contracts of over 12 months' duration materially increase, whether ORR should utilise its power⁶⁷ to reopen the investigation.

- 7.63 In considering whether or not to reopen the investigation, ORR would consider all the of circumstances behind the increased percentage, including the rate of any increase, the reasons for any increase, and the possible impact of the change on the operation of the wider commitments package. For example, if Freightliner's percentage increased only because it had lost a significant volume of spot business and volumes from contracts of less than 12 months' duration, this would be less likely to be a concern for ORR as it would show, in fact, that the Final Commitments were working and competitor FOCs were successfully competing for demand.
- 7.64 Equally, data monitoring could be used by ORR as a basis for releasing Freightliner from the Final Commitments at an earlier date, or, as a basis for varying the Final Commitments if the percentage of volume in contracts of over 12 months' duration materially decreased.⁶⁸

ix. Overall effect of Final Commitments

- 7.65 In light of the above, ORR considers that the effect of the Final Commitments will be that Freightliner's arrangements with its customers will not anti-competitively foreclose competitor FOCs from entering or expanding in the Relevant Markets.
- 7.66 The commitments also have the potential to create a pro-competitive dynamic in the Relevant Markets, such as creating a downstream market for the trading of DSC rail transport services capacity, by the removal of potentially anti-competitive reselling restrictions from agreements across the DSC rail transport sector in Great Britain.
- 7.67 ORR considers that the duration of the Final Commitments is sufficient for competitors to enter or expand in the Relevant Markets, in light of its analysis of the requirements to operate as a FOC and in particular its analysis of the regulatory access regimes and the imminent improvements to those regimes.
- 7.68 The Final Commitments provide scope for careful monitoring, which is particularly important given potential developments which may impact the competitive situation in the Relevant Markets. ORR will continue to monitor the DSC rail transport sector and consider complaints relating to this sector as part of its wider statutory duties and functions.

⁶⁷ Pursuant to section 31B(4)(a) of the Act

⁶⁸ By utilising ORR's powers under section 31A(3) or (4) of the Act

7.69 ORR therefore considers that the Final Commitments fully address its competition concerns.

8. The commitments decision

- 8.1 In light of the above, ORR considers that the Final Commitments as set out in Annex A of this document fully address its competition concerns in this case and that it is appropriate to accept the Final Commitments.
- 8.2 Accordingly, ORR accepts the Final Commitments and has discontinued its investigation in this case.



Annette Egginton
On behalf of the Office of Rail and Road
Head of Competition and Consumer Policy

Annex A – The Final Commitments

FREIGHTLINER LIMITED AND FREIGHTLINER GROUP LIMITED

Commitments Proposed to Address the ORR’s Competition Concerns Pursuant to Case No. 11/2013

RECITALS

- 1 In order to address the ORR’s competition concerns and to assist the ORR in bringing its investigation to a close under Case no. 11/2013, Freightliner Limited and Freightliner Group Limited (together “Freightliner”) offer these commitments (the “Commitments”) under section 31A of the Competition Act 1998 (the “Act”).
- 2 In accordance with sections 31A and 31B of the Act, the Commitments are offered on the understanding that, upon acceptance, the ORR will discontinue its investigation into Freightliner and shall not make a decision within the meaning of section 31(2) of the Act, and shall not give any direction under section 35 of the Act.
- 3 The Commitments, which relate solely to the intermodal business of Freightliner Limited in Great Britain, shall be binding on Freightliner and any other group companies involved in the inland transportation of intermodal deep sea containers by rail in Great Britain.
- 4 The offer of Commitments by Freightliner does not constitute any admission of wrongdoing. Freightliner does not accept that it has in any way infringed competition law and does not consider that it holds a dominant position in any relevant market(s) relating to the inland transportation of intermodal deep sea containers by rail within Great Britain.
- 5 The Commitments set out below shall remain in force from the date on which the ORR formally accepts the Commitments until 31 March 2019 (the “Commitments Period”).

DEFINITIONS

- 6 “Contracts” refers to contractual agreements entered into between Freightliner and its customers in so far as such agreements contain an obligation to provide or take a number of wagons⁶⁹ on the routes between:
 - (a) the port of Felixstowe and inland rail terminals in the Northwest;

⁶⁹ For the avoidance of doubt, this excludes annual tariff agreements which do not include an obligation on Freightliner to make available a given number of contract wagons over a given period.

- (b) the port of Southampton and inland rail terminals in the Northwest;
- (c) the port of Tilbury and inland rail terminals in the Northwest;
- (d) the port of Felixstowe and inland rail terminals in North and West Yorkshire;
- (e) the port of Southampton and inland rail terminals in North and West Yorkshire; and
- (f) the port of Tilbury and inland rail terminals in North and West Yorkshire.

7 “Inland rail terminals in the Northwest” refers collectively to all rail terminals in this geographic area that could potentially be used by Freightliner, to include Freightliner’s inland rail terminals in Manchester (Trafford Park) and Liverpool; the inland rail terminal owned by Eddie Stobart at Ditton; the Trafford Park terminal (owned by DB Schenker); Barton Dock Road; and Port Salford.

8 “Inland rail terminals in North and West Yorkshire” refers collectively to all rail terminals in this geographic area that could potentially be used by Freightliner, to include Freightliner’s inland rail terminal in Leeds and the rail terminals at Wakefield and Selby, but for the avoidance of doubt excluding the terminal at Doncaster and any others in South Yorkshire.

9 In the previous paragraphs “Northwest” refers to DfT’s Modal Shift Revenue Support (MSRS) Zone 11 (see <https://www.gov.uk/government/publications/mode-shift-revenue-support-msrs-scheme-2015-to-2020>) and “North and West Yorkshire” refers to the English ceremonial counties of North and West Yorkshire.

A. Duration of Contracts

10 Freightliner shall not enter into any Contracts with customers for a duration of more than five years.

11 Where Freightliner already has Contracts in place with customers which are for a duration of more than five years, Freightliner commits to provide these customers with the opportunity to terminate their existing Contracts on the fifth anniversary of the Contract by providing at least six months’ notice in writing to Freightliner (subject to the requirement for the customer to pay all outstanding sums due under the Contract).

12 Freightliner shall remove all clauses in its Contracts (and refrain from including such clauses in any new Contracts) which provide for automatic rollover of those Contracts or which prohibit customers from informing other rail freight operators when those Contracts will or may come to an end.

B. Exclusivity

- 13 Freightliner will not enter into any Contracts which:
- (a) require customers to purchase exclusively from Freightliner;
 - (b) require customers to purchase any given proportion of their total demand from Freightliner; or
 - (c) place any restrictions or conditions on customers reselling unused contract capacity to third parties, save only where such restrictions or conditions are justified by safety concerns.
- 14 Freightliner commits to write to customers which have Contracts in place with Freightliner confirming that they are subject to no contractual obligations which:
- (a) require them to purchase exclusively from Freightliner;
 - (b) require them to purchase any given proportion of their total demand from Freightliner or to prioritise Freightliner in relation to additional or future volumes; or
 - (c) place any restrictions or conditions on them reselling unused contract capacity to third parties, save only where such restrictions or conditions are justified by safety concerns.
- 15 For the avoidance of doubt the Commitments in paragraphs 13(c) and 14(c) above shall apply in respect of all contracts and not just Contracts on the routes specified in paragraph 6.

C. Contractual Volume Commitments

- 16 Freightliner commits to providing all customers that enter into Contracts with Freightliner for a duration of more than three years (including those already under Contract), with a unilateral and unconditional right to reduce their contracted wagon commitment by:
- (a) 10% on the third anniversary of the Contract; and
 - (b) an additional 10% on the fourth anniversary of the Contract,
- on the routes set out in paragraph 6 above, for the purposes of switching this volume to another provider of intermodal transport by rail.
- 17 Where Freightliner enters into a Contract with a customer following an open tender for that business (being a tender that is non-discriminatory and advertised), or provides evidence to the ORR that a customer has approached at least one

alternative railfreight operator in writing, the commitment described in paragraph 16 above will not apply.

D. Rebates

- 18 In relation to the routes set out in paragraph 6 above, Freightliner will not enter into any discount or rebate arrangements which relate retrospectively to volumes already purchased or which require customers to purchase exclusively, or a given proportion of, their wagon requirements from Freightliner.
- 19 In relation to the routes set out in paragraph 6 above, Freightliner will not enter into any discount or rebate arrangements by which the price, rebate or discount in one period depends upon the volume purchased from Freightliner in an earlier period.

E. Implementation and Reporting Requirements

- 20 Freightliner will use all reasonable endeavours to ensure that any contractual alterations or other actions required as a result of the Commitments are completed within six weeks of the date on which the ORR formally accepts the Commitments.
- 21 Freightliner will deliver an 'implementation report' to the ORR within two months of the date on which the ORR formally accepts these Commitments.
- 22 Freightliner commits to deliver an annual compliance statement to the ORR, for each period of 12 consecutive months for which the Commitments are in force, within three months after the end of the year to which the annual compliance statement relates.
- 23 In addition to the annual compliance statement, for the purposes of allowing the ORR to effectively monitor the wider impact of the Commitments and the proportions of Freightliner's total volumes carried under contracts with a duration of more than one year, Freightliner commits to deliver to the ORR on a quarterly basis a report in the form set out at Annex 1 (the "Quarterly Report"). The Quarterly Report will provide the ORR with figures for the volume of containers carried by Freightliner during the relevant quarter under contracts with a duration of greater than one year, both in absolute terms and relative to the volume of containers carried by Freightliner otherwise than under contracts greater than one year.
- 24 The implementation report, annual compliance statement and the quarterly report referred to in paragraphs 21, 22 and 23 above shall each be signed off by a senior executive of Freightliner Ltd duly authorised by the board of Freightliner. Each such report shall be duly presented to, and minuted at, a board meeting of Freightliner.
- 25 If requested to do so by Freightliner, the ORR will consider whether the Commitments may be released on the basis that it has reasonable grounds for believing that its competition concerns no longer arise.

- 26 The obligation to deliver annual compliance statements to the ORR will expire following the delivery by Freightliner of an annual compliance statement relating to the last period of 12 consecutive months for which the Commitments remain in place.
- 27 The obligation to deliver Quarterly Reports to the ORR will expire following the delivery by Freightliner of a Quarterly Report relating to the last full quarter for which the Commitments remain in place.

Annex B – Responses to public consultations

A. Introduction

1. ORR has issued two consultations in relation to this matter. The First Consultation, which ran between 3 September and 1 October 2015, related to the Initial Commitments. The Second Consultation, which ran between 19 November and 27 November 2015⁷⁰ related to the Modified Commitments. The representations which ORR received in relation to each consultation are summarised in the remainder of this Annex, together with ORR's response to those representations. Copies of both consultations are available on ORR's website.⁷¹
2. In the course of considering representations received in response to each consultation, ORR met with certain key respondents in order to clarify and gain further understanding of the concerns which were raised.

B. The First Consultation

3. ORR received representations from seven interested parties in response to the First Consultation. Responses were received from competitor FOCs, trade associations, customers and individuals.

i. Seriousness

Representations

4. A number of respondents raised the concern that this case was not appropriate for resolution by commitments. Respondents highlighted that the relevant ORR policy on commitments⁷² states that ORR will not accept commitments in cases where not continuing its investigation would undermine deterrence and/or in cases involving a serious abuse of a dominant position.⁷³
5. Respondents cited guidance issued by the CMA on commitments which states:

⁷⁰ An extension until 2 December 2015 was granted to certain respondents

⁷¹ <http://orr.gov.uk/what-and-how-we-regulate/competition/competition-issues/current-investigations>

⁷² OFT430 paragraphs 4.32 - 4.34

⁷³ OFT430 paragraph 4.32 states that ORR will not deviate from the general principles adopted by the OFT (which is as stated above) unless it is persuaded that the circumstances are sufficiently distinguishable, that the public interest is so served and the circumstances in which the commitments are accepted do not establish an undesirable precedent going forward

“The CMA is very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position.”⁷⁴

6. The key arguments made by respondents were that:
 - particular elements of the conduct identified in ORR’s competition concerns (which in ORR’s preliminary view, included exclusive purchasing obligations and retroactive rebate practices) are *per se* unlawful and/or “*blatantly anti-competitive*” and as such constitute *serious* abuses of a dominant position;
 - the market structure, in particular Freightliner’s high market shares and status as the post-privatisation incumbent, suggested that this case was not appropriate for resolution by commitments;
 - for ORR to accept any commitments in this case would mean it had failed to properly have regard to relevant policy considerations;⁷⁵ and
 - if ORR were to accept commitments, it might have failed to discharge its duties under section 4 of the Railways Act 1993.
7. ORR discussed the representations it received in relation to seriousness with key respondents in face to face meetings. Respondents emphasised views that the Initial Commitments might not have a sufficient impact, rather than stressing that an infringement decision should be made regardless of the commitments offered. Discussions therefore focused on issues relating to access to infrastructure, rather than on whether commitments should not be adopted at all.

ORR’s response

8. ORR carefully considered representations about the appropriateness of this case for commitments in light of representations received. ORR’s assessment as to why this case is appropriate for resolution by commitments is set out at paragraphs 7.1 to 7.11 of the decision.

ii. Access to Infrastructure

Representations

9. A number of respondents to the Initial Notice made representations that whilst the Initial Commitments might operate to release demand from Freightliner’s arrangements with its customers, they would not resolve structural issues in the

⁷⁴ CMA8 paragraph 10.17

⁷⁵ For a list of factors to be included in the consideration of whether a matter constitutes a serious abuse see OFT430 paragraph 4.34 and OFT407, paragraph 4.4, footnote 16

Relevant Markets (and the wider intermodal sector) relating to access to the network and key facility infrastructure.

10. Respondents cited particular issues in the Relevant Markets in securing access rights to paths on the Felixstowe branch line (the **Felixstowe Branch Line**) and securing access to the Maritime terminal at the port of Southampton (**Southampton Maritime**) which is controlled by Freightliner.
11. Respondents suggested that ORR could not be fully satisfied that its competition concerns were addressed unless issues relating to access were resolved. Respondents made representations that the measures to release customer demand would be ineffective unless Freightliner was, in turn, required to divest access rights to the rail network it currently holds, and to grant access to key facility infrastructure which it controls.
12. Representations made in relation to access to infrastructure generally were that:
 - Freightliner's competitors cannot quote for business without first securing access to necessary infrastructure, yet cannot secure access to infrastructure without securing business (a '*chicken and egg*' problem);
 - Freightliner's strong position in terms of access rights to the national rail network and control of key terminal infrastructure necessary for operating DSC rail transport services might in itself constitute an abuse of a dominant position;
 - the current access issues are a result of Freightliner's contractual practices, which have entrenched its incumbency advantages, and as such should be addressed as part of the current investigation;
 - the commitments should include additional obligations for Freightliner to allow access to terminal infrastructure it holds and to divest access rights to paths on the national rail network to its competitors;
 - the wider policy concerns relating to access have not been addressed in ORR's investigation and should be referred to the CMA;⁷⁶ and
 - the direct regulatory access regimes are not fit for purpose and fail to achieve the objective of facilitating competition between railway undertakings.

The Felixstowe Branch Line

13. The Felixstowe Branch Line is a single track connecting the port of Felixstowe to the national rail network. Access to the Felixstowe Branch Line is controlled, in the first

⁷⁶ Such a measure would likely have to be taken under ORR's concurrent powers to refer markets to the CMA under Enterprise 2002

instance, by Network Rail who grants rights to access through track access contracts. These contracts are subject to approval by ORR.⁷⁷ Mechanisms for transferring access rights between FOCs within the duration of access contracts (where there is no alternative space⁷⁸ on the network) are provided for in the Network Code (the **Network Code**).⁷⁹ Applications to transfer access rights are made in the first instance to Network Rail. There are provisions for decisions on access under the Network Code to be appealed to ORR.

14. One respondent suggested that the access regime within the port of Felixstowe was working well (in contrast to the port of Southampton) due to the implementation by the port operator⁸⁰ of an open and transparent tendering process for access rights to the port infrastructure. The respondent suggested that the fair regime at the port was having the knock-on effect that corresponding access to the Felixstowe Branch Line was also being granted fairly. However, a number of representations were received suggesting that obtaining the necessary access to the mainline network via the congested Felixstowe Branch Line was problematical. Some representations noted that there were unlikely to be additional paths available to competitors to operate DSC rail transport services to and from the port of Felixstowe even if they did manage to secure some customer demand as a result of commitments. This would result in a need to rely on existing mechanisms designed to facilitate the transfer of access rights in the Network Code. Some representations received suggested that these mechanisms did not work well for DSC traffic where the transfer of business was less than a full train load.
15. Respondents stated that the mechanisms in Part J of the Network Code, namely the *'use it or lose it provision'* (requiring a failure to use a path for 90 days), and, the *'primary purpose provision'* (requiring at least 50% of the demand carried on a path to switch) did not work well for intermodal traffic, where trains typically carry the demand of a number of customers. Respondents stated that this meant that DSCs hauled on behalf of any particular customer, aside from a very small number of the largest ones, would account for less than 50% of the boxes hauled on a particular

⁷⁷ ORR's functions in relation to the approval of track access contracts are set out at sections 17 to 22C of the Railways Act 1993. In exercising these functions ORR is bound by its duties under section 4 of the Railways Act 1993, one of which (to be balanced against other duties) is *"to promote competition in the provision of railway services for the benefit of users of railway services"*

⁷⁸ Commonly referred to as 'white space', referring to gaps in the timetable where services can run

⁷⁹ The Network Code is a common set of rules that apply to all parties who have a contract for rights of access to the track owned and operated by Network Rail. The Network Code is incorporated into, and therefore forms part of, each such bilateral contract. The mechanisms relating to the allocation of timetabling are set out in Part D, for the transfer of access in Part J, and for making an appeal to ORR in Part M. For more information about the Network Code see <http://orr.gov.uk/what-and-how-we-regulate/track-access/the-network-code>

⁸⁰ Hutchinson Port Holdings <https://www.portoffelixstowe.co.uk/>

service. Respondents stated that it was difficult for competitors to identify the 'primary purpose' of any particular path in order to effectively apply for access rights to switch.

16. Two respondents highlighted an example of a recent dispute between two FOCs regarding a switch of intermodal traffic, where, in the respondents' view, there had been issues with the application of the Network Code. Further representations in relation to access to the Felixstowe Branch Line were that:
 - Freightliner should be required to give up light engine paths⁸¹ to generate more capacity for DSC rail transport services; and
 - Freightliner should be required to divest paths on the Felixstowe Branch Line.

Southampton Maritime

17. Southampton Maritime is not part of the national rail network. As such, it is not subject to the Network Code. Instead, access to the terminal infrastructure is governed by the Access and Management Regulations 2005 (the **Access Regulations**). The Access Regulations are the domestic implementation of a number of European Union directives⁸² introduced with the key objectives of: (i) opening up the rail transport market to competition; (ii) improving the interoperability and safety of national networks, and; (iii) developing rail transport infrastructure.⁸³
18. A number of respondents made representations about access to Southampton Maritime. Respondents highlighted that Southampton Maritime is controlled by Freightliner, as such, access to the terminal is determined by the same entity which also operates a downstream DSC rail transport service (this is commonly referred to as 'vertical integration').
19. A number of respondents represented that the Access Regulations were inadequate in dealing with issues caused by vertical integration at Southampton Maritime. Respondents suggested that Freightliner, as the owner of the terminal, was in a position to reject all requests for access to Southampton Maritime on the basis of assertions that it was full. Two respondents made representations that Freightliner was not using Southampton Maritime efficiently. Representations were received that

⁸¹ Light engine paths denotes network capacity that is used by 'light engines', i.e. by locomotives without any wagons attached

⁸² Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ L237, 24.08.1991, p.25), as amended by Directive 2001/12/EC of 26 February 2001 (OJ L75, 15.3.2001, p.1) and Directive 2004/51/EC of 29 April 2004 (OJ L164, 30.4.2004, p.64), both of the European Parliament and of the Council, and Council Directive 2001/14/EC of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L75, 15.3.2001, p.29), as amended by Directive 2004/49/EC of 29 April 2004 on safety on the Community's railways (OJ L220, 21.6.2004, p.16), both of the European Parliament and of the Council

⁸³ See http://ec.europa.eu/transport/modes/rail/index_en.htm

suggested that the commitments should require Freightliner to offer access to Southampton Maritime.

20. Other representations made in relation to access to Southampton Maritime included that:
- Southampton Maritime should be declared ‘congested’ and Freightliner should be required to invest in the terminal in order to increase capacity; and
 - Freightliner’s refusal to grant access may constitute an additional exclusionary abuse, as it may amount to a refusal to supply access to an essential facility.

ORR’s response

21. ORR has carefully considered the particular issues raised in relation to the Felixstowe Branch Line and Southampton Maritime and in relation to access generally. In doing so ORR has drawn upon its experience of the operation of the access regime including the Network Code and hearing appeals under the Access Regulations.
22. In order to operate a DSC rail transport service, FOCs require access to necessary infrastructure. ORR considers that the respective access regimes, namely the Network Code⁸⁴ and the Access Regulations (collectively the ‘**Access Regimes**’) are designed, and operate, to deal with the fair, transparent and non-discriminatory distribution of access between FOCs and to deal with issues such as the efficient use of rail infrastructure. The Access Regimes provide an established framework for the resolution of disputes between competing FOCs and a route to independent regulatory scrutiny of the complex commercial and technical issues (e.g. timetabling and the efficient use of infrastructure) which can arise in the context of access disputes.⁸⁵
23. When determining access appeals, ORR has significant information gathering powers which it may utilise, where appropriate, to determine disputes.

Improvements to the Access Regimes

24. ORR notes that the Access Regimes are currently subject to incremental changes which are intended better to address issues such as the coordination of winning business and obtaining corresponding rail paths on the national rail infrastructure in the context of intermodal traffic. ORR notes the establishment of an industry working

⁸⁴ For infrastructure which is part of the national railway network as defined by the Railways Act 1993

⁸⁵ For the reasons stated at paragraphs 7.49 to 7.51 of the decision, ORR considers that the duration of the commitments has regard to the timescales for planned improvements to the Access Regimes and is sufficient to allow switching

group to deal with issues with the application of Part J of the Network Code to intermodal traffic. Furthermore the transposition of Directive 2012/34/EU (the **Directive**)⁸⁶ into UK law has the objective of improving rights of access to infrastructure (including terminal infrastructure) by modifying the provisions of the current Access Regulations.

25. ORR is aware of industry discussions to improve the Network Code (especially Part J, which contains the *use it or lose it* and *primary purpose* provisions for facilitating switching) so as to make it operate more efficiently in relation to the intermodal sector. ORR considers that industry, having identified issues with the application of Part J of the Network Code to intermodal, should be sufficiently incentivised to deliver improvements in a relatively short period of time. If no industry agreement can be reached, ORR has the power to intervene to propose modifications to the Network Code.
26. ORR also notes the forthcoming transposition of the Directive, which, when implemented, will result in changes to the Access Regulations. The overall objective of the Directive is to strengthen further the governance of railway infrastructure, thereby enhancing the competitiveness of the rail sector vis-à-vis other modes.⁸⁷
27. The implementation of the Directive was consulted upon by the Department between 24 March 2015 and 18 May 2015.⁸⁸ A copy of the draft implementing regulations was published alongside the Department's consultation.⁸⁹ The Department noted in its Impact Assessment⁹⁰ that certain provisions in the Directive were new and could bring about additional benefits in terms of increasing competition and opening access to rail service facilities.
28. ORR considers that implementation of the Directive will improve the operation of the Access Regulations. In particular, the new implementing regulations will give ORR powers to monitor the competitive situation in rail services markets and control

⁸⁶ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) (OJ L343, 14.12.2012, p.32)

⁸⁷ In particular the Directive seeks to address the 'equal access challenge', namely, conflicts of interest which arise in vertically integrated railway holdings which naturally lead to protectionist practices which may impair competition in the rail sector. In particular the Directive seeks to apply appropriate safeguard measures preventing such conflicts of interest and distortions of competition arising in the context of all of the essential functions of infrastructure managers http://ec.europa.eu/transport/modes/rail/packages/2013_en.htm

⁸⁸ <https://www.gov.uk/government/consultations/recast-first-railway-package>

⁸⁹ The draft Railways Infrastructure (Access and Management) and Railway (Licensing of Railway Undertakings) (Amendment) Regulations 2015 (**Draft Regulations**)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416363/consultation-paper-recast.pdf

⁹⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416368/annex-w-ia-recast-1st-rail-package.pdf

arrangements for access to railway infrastructure (including rail terminals) and services with a view to preventing discrimination against applicants (amongst other matters).⁹¹ This power may be exercised on ORR's own initiative. A number of other requirements will be included in the implementing regulations including requirements placed upon certain rail infrastructure managers to maintain separate accounts and retain independence in decision making on access to the relevant infrastructure.

Conclusions

29. ORR notes that the current investigation has focused on Freightliner's arrangements with its customers for the provision of DSC rail transport services, rather than wider structural issues with access to infrastructure in the rail freight sector. ORR's competition concerns reflect this focus.⁹²
30. The objective of the Final Commitments is to ensure that Freightliner's arrangements with its customers do not anti-competitively foreclose competitor FOCs from entering or expanding in the Relevant Markets. ORR considers that the Final Commitments fully address this issue.
31. ORR notes that a finding that an undertaking has a dominant position is not, in itself, an infringement of competition law.⁹³ ORR notes there are existing and established regulatory alternatives that have been designed to address the access issues raised by respondents. ORR therefore considers that in the context of this case it is not necessary for commitments requiring Freightliner to divest its existing access rights or to require it to grant access to competitors at Southampton Maritime or divest paths it holds on the Felixstowe Branch Line in order to fully address its competition concerns.
32. ORR is therefore of the view that its competition concerns can be fully addressed by the acceptance of commitments, which fully address issues regarding Freightliner's arrangements with its customers and facilitate the regular release of customer demand for competition. The ORR will continue carefully to monitor both the access issues identified by respondents as potential issues for the development of competition and the effectiveness of the overall regulatory regime to address any such issues.

⁹¹ See in particular Regulation 35(2) of the Draft Regulations and Article 56(2) of the Directive

⁹² ORR notes that services at ports and terminals are excluded from the congested infrastructure provisions in the Access Regulations. In any event ORR considers that declaring Southampton Maritime as congested infrastructure (as suggested by one respondent) is not necessary to fully address ORR's competition concerns in this case

⁹³ *Michelin v Commission* [1983] ECR 3461, [1985] 1 CMLR 282, paragraph 57. An undertaking in a dominant position does, however, have a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market

iii. Reporting requirements

Representations

33. A number of representations were made in relation to the adequacy of the reporting requirements in the Initial Commitments, namely:
- in order to address the risk that Freightliner’s strategy may shift from exclusionary practices to predatory pricing, ORR should insist upon price-based reporting for the duration of the commitments; and
 - compliance with the commitments will be difficult to discern because: the reporting requirements are too infrequent; and, there is no requirement for compliance to be independently audited or for any assurance from Freightliner’s senior management as to the accuracy of responses to reporting requirements.

ORR’s response

34. ORR considers that the reporting requirements put in place by the commitments are adequate for ORR to monitor developments in the Relevant Markets. ORR considers that further reporting requirements to mitigate the general risk of future predatory pricing would not relate to the abuse identified are not necessary to fully address ORR’s competition concerns.
35. ORR considers that independent auditing is not necessary to fully address its competition concerns; ORR considers that such a commitment may impose unnecessary resource burdens on Freightliner particularly as the quarterly reports detailing volumes of containers in contracts and annual compliance reports will be sufficient for ORR to adequately monitor compliance. In addition to the reporting requirements placed on Freightliner, ORR considers that members of the DSC rail transport industry and customers will be in a position, and have a strong commercial interest, to inform ORR if they are affected or otherwise suspect a breach of any commitments.
36. ORR considered that representations it received about requiring senior personnel within Freightliner to confirm the accuracy of reports sent to ORR raised important issues; this issue was put to Freightliner. Freightliner proposed modifications to the Initial Commitments to ensure that a senior executive of Freightliner Limited, as delegated by Freightliner Group Limited’s Board, would be the signatory of Freightliner’s reporting requirements. The proposed modifications are described in Chapter 3 of this Notice. ORR’s assessment of why the modifications, which are contained in the Final Commitments, fully address the issues raised by the representations is set out at paragraphs 7.59 to 7.60 of the decision.

iv. Geographic scope

Representations

37. Respondents made a number of representations about the geographic scope of the commitments. Representations raised concerns that:
- the limited geographic coverage of the Initial Commitments would allow Freightliner to leverage its dominant position in the Relevant Markets into markets not covered by the commitments. In particular representations suggested that the commitments should apply to:
 - inland terminals in the Midlands and the North East of England; and
 - London Gateway in addition to the Southern Ports.
 - the limited coverage could allow Freightliner to circumvent the commitments by using alternative inland terminals within the Relevant Markets but not specified within the Initial Commitments given that there is available alternative inland capacity. Representations were made that the commitments should apply to all inland terminals within the Relevant Markets.

ORR's response

38. ORR considered that representations it received in relation to coverage of terminals within the Relevant Markets raised issues with the Initial Commitments, particularly in relation to the potential for circumvention. The exception to this was representations received in relation to the inland terminal at Doncaster, for the reasons set out at paragraph 39). These issues were raised with Freightliner. In response, Freightliner proposed modifications that the commitments apply to all terminals within Zone 11 of the Department's Intermodal Zone map for calculating MSRS support, including but not limited to: Freightliner's terminals at Manchester (Trafford Park) and Liverpool; the Eddie Stobart terminal at Ditton; the Trafford Park terminal owned by DB Schenker; the Barton Dock road terminal; and the terminal at the port of Salford. In relation to Yorkshire, Freightliner proposed that all terminals within the ceremonial county boundaries of North and West Yorkshire should be included within the scope of the commitments, including but not limited to the terminals at: Leeds; Wakefield and Selby.
39. ORR is of the view that it is not necessary for the commitments to include the terminal at Doncaster (in South Yorkshire), as ORR considers that the competitive pressure from road haulage between that particular terminal and the Southern Ports is stronger than at terminals further North and West in the region. This is because ports towards the South of the Yorkshire region are closer to the Southern Ports, reducing the efficiencies and advantages of rail. As such at the Doncaster terminal

the competitive advantage enjoyed by rail FOCs is weakened such that ORR considers it is not necessary for the commitments to be applicable.⁹⁴ ORR considers that provided the commitments apply to all terminals in the North and West of the region of Yorkshire, they are sufficient to fully address its competition concerns in the Relevant Markets.

40. ORR notes that the representations requested that the commitments be extended, in some cases, beyond the scope of the Relevant Markets. ORR has carefully considered the extension of commitments outside of the geographic areas in which its competition concerns were identified; however it considered that it was not necessary to do so to fully address its competition concerns. In relation to inland terminals ORR considers it unlikely that Freightliner will face commercial incentives to circumvent the commitments by switching to inland terminals in these other regions given the desirability for minimising the onward road distance between inland terminals and final destinations of DSCs. ORR also notes that DSC rail transport customers do use different transport modes and providers for different routes; as such ORR considers that the potential for Freightliner to leverage market power between regions is limited.
41. ORR is of the preliminary view that there is excess capacity available for use by alternative FOCs and Freightliner does not enjoy the same incumbency advantages in terms of access to infrastructure at London Gateway (in contrast to the situation at the Southern Ports). ORR also notes that at the present time London Gateway accounts for only approximately 5% of the DSCs transported by rail (measured by tonnage) moved in and out of ports in the South of Great Britain. This is fewer than the volume of rail DSCs moved through the main DSC ports of Felixstowe (which accounts for approximately 59% of the total) and Southampton (accounting for approximately 30%).⁹⁵ To date London Gateway has not attracted any DSCs shipped from the Far East. ORR considers that it may be premature to draw any inferences about market power from the relative shares of FOCs of traffic in and out of London Gateway because the facility is still relatively new and retains spare capacity.

v. Duration

Representations

42. Two respondents made representations suggesting that the duration of the Initial Commitments was too short. One respondent suggested that commitments should

⁹⁴ In contrast to terminals situated further away from the Southern Ports where rail gains increasing advantages over road, see paragraph 66, below

⁹⁵ Data is for the year 2015 up to October. Data is for the year 2015 up to October. Source: Paladin database, Network Rail

straddle two price control periods⁹⁶, namely control period 5 (**CP5**) and control period 6 (**CP6**) so that commitments would still be in place following any changes affecting FOCs (particularly in relation to charging). Two respondents made representations that the commitments would not allow sufficient time to obtain access to locomotives, wagons, drivers and other resources necessary to enter and expand in the Relevant Markets.

43. Respondents highlighted issues with obtaining access to the Felixstowe Branch Line and the Southampton Maritime terminal within the proposed duration of the Initial Commitments. It was argued that access issues would not be resolved, and therefore customer demand could not be captured, within the three year duration of the Initial Commitments. Respondents highlighted that industry was taking forward discussions to reform Part J of the Network Code, but stated that this process would take time, reducing the efficacy of the commitments given their limited timescale.
44. Respondents also stated that opportunities to compete for demand released by the commitments within the initial three year duration would be limited by the lack of transparency of when customer contracts were ending. Representations were made that competitor FOCs would be unable properly to target their sales activities given this lack of transparency.

ORR's response

45. For the reasons stated at paragraphs 7.48 to 7.53 of this decision ORR considers that the duration of the Final Commitments is sufficient to fully address ORR's competition concerns.
46. ORR notes that any changes brought about by CP6 would apply equally to all FOCs; ORR therefore cannot see a material link between the matters which are the subject of this investigation and any changes which might be brought about upon the expiry of the current control period.
47. ORR discussed the availability of resources, such as locomotives and wagons, in meetings with respondents and experts within ORR. In light of these discussions ORR considers that the need to obtain such resources would not undermine competitor FOCs' ability to win business within the duration of the Final Commitments.
48. ORR does however consider that representations it received about the operation of the relevant Access Regimes and the resultant ability of competitor FOCs to win business within the duration of the commitments did raise issues with the Initial

⁹⁶ A control period is a period of time for which ORR sets the outputs required of Network Rail and the associated access charges. CP5 is scheduled to run between 1 April 2014 and 31 March 2019. The duration of CP6 has not yet been determined

Commitments. Notably ORR expected that certain changes to the Access Regimes might have been made sooner than has been the case. ORR also considered that representations it received about the lack of transparency about the end of customers' contracts with Freightliner raised issues with the Initial Commitments.

49. In response to these issues Freightliner proposed that the duration of the commitments be extended so that they are in force until 31 March 2019. Freightliner also proposed a new commitment to remove any clauses in contracts between Freightliner and its customers which prohibit customers from informing alternative FOCs of the end dates of their contracts with Freightliner. ORR considers that removing such clauses will increase transparency in the Relevant Markets and enable competitor FOCs to target their sales activities, maximising their ability to compete for customers' demand when released from contracts. ORR considers that these additions to the commitments ensure that its competition concerns are fully addressed.

v. Implementation

Representations

50. One representation suggested that the conditions for the implementation of the Initial Commitments within six weeks were too vague and could be difficult to enforce. The representations also stated that the requirements for implementation should be in the body of the commitments and not the recitals.

ORR's response

51. ORR considers that the wording of the commitment in the Initial Commitments requiring Freightliner to use all reasonable endeavours is proportionate in terms of placing a positive obligation on Freightliner to ensure that the commitments are implemented quickly and effectively. ORR will be able to assess whether Freightliner has complied with this commitment through consideration of Freightliner's implementation report and, if necessary, by liaising with third parties.
52. ORR considered that the representation that the implementation obligation should be contained in the main body of the commitments, rather than the recitals, raised issues with the Initial Commitments, and put this issue to Freightliner. Freightliner proposed modifications to the commitments to move this obligation correspondingly.

vi. Minimum volume commitments

Representations

53. One representation stated that the 10% volume release at the ends of years three and four of the contracts is minimal. The representation suggested that this level of volume release would have little impact in terms of releasing customer demand for competition.
54. ORR considers that this provision is sufficient as part of the overall package of commitments. ORR notes that the release of 10% of volumes from contracts of over three years' duration acts together with restrictions on, for example, rebates, exclusivity and roll-over clauses to ensure that, in ORR's preliminary view, at least 50% of volumes currently carried by Freightliner will be out of contract by the end of year one of the commitments and open to competition, and by the end of the second year this percentage will rise to 100%.
55. ORR therefore does not consider it necessary for modifications to be made to address representations made in relation to the 10% volume release.

C. The Second Consultation

56. ORR received four responses to the Second Consultation. Responses were received from competitor FOCs and customers.
57. One of the respondents was supportive of the Modified Commitments. Another of the respondents simply stated that they had no further comments to make on the Modified Commitments. The points made in the remainder of the representations are set out below.

i. Seriousness

Representation

58. Representations were received reiterating representations that this case, in their view, constituted a serious abuse of a dominant position and as such should be met with financial penalties, rather than resolution by commitments.

ORR's response

59. ORR carefully considered the reiterated representations on seriousness and the appropriateness of this case for commitments. ORR remains of the view however that this case is appropriate for resolution by commitments, for the reasons set out at paragraphs 7.1 to 7.11 of this decision.

ii. Geographic scope

Representations

60. A representation was received suggesting that the Modified Commitments should be extended so as to apply to routes to and from London Gateway and to routes from the inland terminal at Doncaster.

London Gateway

61. One representation stated that ensuring fair competition for traffic to and from London Gateway was crucial for securing real competition in the DSC rail transport sector. The representation suggested there was a plausible concern that Freightliner would extend its dominant position which “*it had so abused*” on to neighbouring routes to extend its exclusionary practices (with the same customers) to routes to and from London Gateway. The representation asserted that ORR had failed to consider, or indeed rule out the plausibility of competition concerns raised in relation to London Gateway.

Doncaster and South Yorkshire

62. One representation argued that the terminal at Doncaster was highly substitutable with other terminals in Yorkshire. The representation highlighted gauge adjustments being made to the west of Doncaster which would increase the substitutability of terminals within the region by improving the operational efficiencies of the terminals at Leeds and Wakefield in particular.
63. The representation highlighted the geographic proximity of Doncaster to other terminals in the region, in particular Wakefield.

ORR’s response

64. ORR remains of the view that it is not necessary for London Gateway to be within the geographic scope of the Final Commitments in order for its competition concerns to be fully addressed. For the reasons stated in response to representations made in the First Consultation (paragraphs 40 to 41 above) and at paragraphs 5.8 and 7.55 to 7.56 of ORR’s decision, ORR considers that the competitive conditions at London Gateway are different from those at the Southern Ports. ORR understands that Freightliner has not extended allegedly exclusionary practices to routes to and from London Gateway. ORR understands that Freightliner’s arrangements with its customers for DSC rail transport services on these routes consist wholly of spot arrangements; that is they do not contain any contractual wagon commitments.⁹⁷ ORR also notes that London Gateway currently handles a significantly smaller

⁹⁷ A definition of what constitutes a ‘spot’ arrangement is set out at footnote 57 of this decision

volume of DSCs than the other Southern Ports (notably Felixstowe and Southampton).

65. ORR also considers that the implementation of the Final Commitments will act as a deterrent to FOCs with strong market positions on any particular markets, from engaging in the type of activity identified by this decision as potentially anti-competitive. In relation to the risk that Freightliner might implement any allegedly abusive conduct onto routes to and from London Gateway, ORR considers that this commitments decision sends clear signals as to the appropriateness of such behaviour. ORR would not be prevented from taking further enforcement action if there were reasonable grounds to suspect that any conduct on routes to and from London Gateway (engaged in by Freightliner or otherwise), amounted to an infringement of the competition prohibitions.
66. In relation to Doncaster, ORR remains of the view that the greater proximity of this inland terminal to the Southern Ports, as compared to terminals situated further North within the region, means that on routes to and from that particular terminal there is a increase in the competitive pressure from road haulage, weakening the competitive advantage enjoyed by rail FOCs. ORR does not consider that developments in gauge clearance increasing the operational efficacy of Leeds and Wakefield will affect this view. As such ORR considers that it is not necessary for Doncaster to be within the scope of the commitments in order for its competition concerns to be fully addressed.

iii. Access to infrastructure and duration

Representations

67. Representations were received reiterating arguments that the commitments would not address issues in relation to access to infrastructure at Felixstowe and Southampton. Representations expressed scepticism about the forthcoming changes to the Access Regimes applicable at each port. In a follow up meeting however, one respondent did indicate that when implemented, their view was that the improvements to the Access Regulations may operate to facilitate an improved regime for access to infrastructure, though this would only be clear once the Directive being transposed had been put into operation.⁹⁸
68. Representations were also received that the increase in duration proposed by Freightliner was not sufficient to reflect the time needed for competitors to secure access at the respective ports. The representation suggested that the duration of the commitments should be extended to five years.

⁹⁸ This representation may have been influenced by the respondent's understanding of the timetable for both the transposition of the Directive and proposed changes to Part J of the Network Code

69. Two respondents highlighted the possibility of a market study being carried out under the Enterprise Act 2002 with a view to making a market investigation reference to the CMA. One respondent suggested ORR should set a firm date for undertaking such a market study as part of the commitments package.

ORR's response

70. ORR considers that the proposed extension of the Final Commitments will provide for the improvements in the respective Access Regimes to be implemented or be much closer to the point of implementation. ORR considers that this will ensure that the duration of the Final Commitments is sufficient for competitors to take advantage of the release of contractual demand affected by the Final Commitments and commence the operation of alternative DSC rail transport services in the Relevant Markets. ORR's full reasoning in this regard is set out at paragraphs 7.48 to 7.53 of the decision; information on the implementation of improvements to the Access Regimes is set out at paragraphs 21 to 32 of this Annex.
71. ORR notes the representations about its powers to conduct a market study under the Enterprise Act 2002. ORR will, of course, continue to monitor the competitive situation in the DSC rail transport sector as part of its wider statutory functions. This will include consideration of any future complaints or submissions suggesting that ORR utilise its powers under the Enterprise Act 2002. ORR does not, however, consider it necessary for it to set a firm date as to when or how it may use its market investigation reference powers in the future.



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